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Jury Unanimity in California: Should it Stay or Should it Go

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JURY UNANIMITY IN CALIFORNIA: SHOULD IT STAY OR SHOULD IT GO?

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The time is fast approaching, if it has not already come, when trial by jury, like every other part of our legal fabric, will become the subject of public criticism . . .

—William Forsyth, 1852¹

I. INTRODUCTION

In 1989 Erik and Lyle Menendez gunned down their parents in the family's Beverly Hills mansion. Both brothers confessed to the killings.² Prosecutors characterized the brothers as cold-blooded killers motivated by greed, while the defense argued that the brothers acted in self-defense.³ Result: After separate trials for Erik and Lyle, the jurors in each case deadlocked.⁴

Jurors in a 1992 Santa Clara sexual molestation case deadlocked 10-2 for conviction.⁵ Prosecutors later learned that "one juror held out for acquittal because he wanted evidence not even required by law."⁶ The young victim was forced to repeat her painful recollections in front of a second set of strangers. The second jury found the defendant guilty of molestation and kidnapping.⁷

The recent trial of O.J. Simpson raised the specter of yet another hung jury. Each day, millions of Americans saw a courtroom that often seemed out of control. Attorneys on both sides openly ridiculed and criticized each other. Jurors confronted emotionally laden and questionably relevant issues such as domestic violence, race, discrimination, and police conspiracy.⁸ Behind all of this confusion and legal posturing lay the real reason why these actors were assembled: Nicole Brown Simpson and Ronald Goldman were murdered and a mountain of evidence pointed to O.J. Simpson as the killer.

1. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 215 (New York, Cockcroft & Co. 1878).

2. Maura Dolan, *Why Jurors Err: They're Just Human*, L.A. TIMES, Sept. 25, 1994, at A1, A22.

3. *Id.*

4. *Id.* The Menendez brothers were retried and jurors ultimately convicted both on two counts of first degree murder with special circumstances. *People v. Menendez*, No. 3A068880, 1996 WL 121110 (Cal. Super. Trans. Mar. 20, 1996).

5. Sandra Gonzales, *Movement Afoot to Reform Juries: Plan Would Eliminate Requirement of Unanimity in State Criminal Trials*, SAN JOSE MERCURY NEWS, May 8, 1995, at 1A.

6. *Id.*

7. *Id.*

8. See *Weighing the Necessity of Change*, L.A. TIMES, Oct. 8, 1995, at S1 [hereinafter *Necessity of Change*].

With all of these issues and subissues, the potential for a juror hanging a hat on something unrelated to the case or outside the scope of the law or facts seemed high. Members of the legal community and the public braced themselves for a hung jury.⁹ Many wondered whether the jury could make sense of the complicated scientific evidence and whether they would be unduly influenced by the Fuhrman tapes,¹⁰ racial tension, or the long period of sequestration.¹¹ Ironically, the Simpson case ended in a unanimous verdict, acquitting O.J. Simpson of all charges.¹² Rather than declaring this a triumph of the system, however, many still wondered whether the verdict was just.¹³

These California cases and other high-profile trials around the nation involving controversial outcomes have spurred a dramatic increase in criticism of the jury system.¹⁴ Californians do not want to see another criminal case end without a decision, especially where the evidence against the defendant seems so convincing. To prevent this outcome, some critics are attacking what they feel is one of the keys to the jury problem: the unanimous verdict requirement.

The California Supreme Court has stated on numerous occasions that the right to a jury trial described in article I, section 16 of the California Constitution¹⁵ includes the right to a unanimous verdict.¹⁶

9. Andrew Blum, *A Hostile Environment For Unanimous Juries?*, NAT'L L.J., Sept. 11, 1995, at A1. In separate polls of lawyers conducted by *The National Law Journal*—in September, 1994 and February, 1995—39% predicted that the jury would hang. *Id.* Charles Calderon cites a poll in which 75% of those questioned believed Simpson was guilty but only 35% thought he would actually be convicted. Charles M. Calderon, *Jury System Needs Reform*, USA TODAY, June 12, 1995, at 10A.

10. The Fuhrman tapes are a series of taped interviews between Los Angeles police detective Mark Fuhrman and screenwriter Laura Hart McKinny in which Fuhrman boasts about police brutality and evidence manufacturing and utters numerous racial epithets. Jim Newton et al., *Fuhrman Tapes Aired: a Recital of Racism, Wrath*, L.A. TIMES, Aug. 30, 1995, at A1.

Some people feel that the controversy over the admissibility of the tapes transformed the Simpson trial into a trial of detective Fuhrman and the Los Angeles Police Department. *Id.* at A14.

11. Blum, *supra* note 9; at A1.

12. Jim Newton, *Simpson Not Guilty: Drama Ends 474 Days After Arrest*, L.A. TIMES, Oct. 4, 1995, at A1 [hereinafter Newton, *Not Guilty*].

13. See Bill Boyarsky, *D.A. Says System Needs a Shake-Up*, L.A. TIMES, May 5, 1995, at B1; Dolan, *supra* note 2, at A22 [hereinafter Boyarsky, *Shake-Up*] (discussing the controversial trials of Rodney King, William Kennedy Smith, Bernhard Goetz, and others).

14. *Id.*

15. The California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." CAL. CONST. art. I, § 16.

To eliminate the unanimity requirement, the people must propose and vote on a constitutional amendment, and the California Supreme Court must render some favorable decisions.¹⁷ This process has already begun.

In February 1995 California assemblymember Richard Rainey drafted a proposed constitutional amendment to allow for convictions on a 10-2 jury vote except in death penalty cases.¹⁸ California Senate Judiciary Chairperson Charles Calderon authored another proposed constitutional amendment.¹⁹ Calderon's bill allows for criminal convictions on 11-1 verdicts and, like Rainey's bill, does not apply to death penalty cases.²⁰ In early May 1995, the Assembly Committee on Public Safety rejected Assemblymember Rainey's proposed amendment.²¹ Similarly, six of seven members of the

16. *People v. Wheeler*, 22 Cal. 3d 258, 265, 583 P.2d 748, 754, 148 Cal. Rptr. 890, 895 (1978); *People v. Collins*, 17 Cal. 3d 687, 693, 552 P.2d 742, 745, 131 Cal. Rptr. 782, 785 (1976), *cert. denied*, 429 U.S. 1077 (1977); *People v. Feagley*, 14 Cal. 3d 338, 350, 535 P.2d 373, 380, 121 Cal. Rptr. 509, 516 (1975); *People v. Superior Court*, 67 Cal. 2d 929, 932, 434 P.2d 623, 625, 64 Cal. Rptr. 327, 329 (1967).

17. Boyarsky, *Shake-Up*, *supra* note 13, at B1.

18. Assembly Constitutional Amendment 18 would provide that "in a criminal action in which either a felony or a misdemeanor is charged, five-sixths of the jury may render a verdict; but if the death penalty is sought, only an unanimous jury may render the verdict." CALIFORNIA ASSEMBLY COMM. ON PUB. SAFETY, COMMITTEE REP. FOR ASSEMBLY CONSTITUTIONAL AMENDMENT 18, 1995-1996 Regular Sess. Feb. 23, 1995 [hereinafter A.C.A. 18] (failed in committee). The measure would also require a unanimous jury verdict if the parties in a misdemeanor action agreed on a jury consisting of nine or fewer persons. *Id.*

Rainey's proposal is supported by the California District Attorney's Association, the Sacramento County district attorney, the Association of Los Angeles Deputy Sheriffs, Inc., the California State Sheriffs' Association, the Doris Tate Crime Victims Bureau, the California Peace Officers' Association, and the California Police Chiefs' Association. *Id.*

19. Senate Constitutional Amendment 24 amends the California Constitution to "allow eleven-twelfths of the jury to render a verdict in a criminal action except in an action where the defendant may be sentenced to the death penalty or life without parole." CALIFORNIA SENATE COMM. ON CRIM. PRO., COMMITTEE REP. FOR SENATE CONSTITUTIONAL AMENDMENT 24, 1995-1996 Regular Sess. June 27, 1995 [hereinafter S.C.A. 24] (failed in committee).

Calderon's bill has drawn support from the California Correctional Peace Officers' Association, the district attorneys of San Diego and Sonoma County, the chiefs of police in Escondido and Claremont, the San Bernardino County sheriff, the Santa Ana Police Officers' Association, and the Doris Tate Crime Victims Bureau. *Id.*

20. *Id.*

21. Bill Ainsworth, *Juror Unanimity Measure Is Blocked*, RECORDER, May 10, 1995, at 4 [hereinafter Ainsworth, *Measure Blocked*]. The proposed amendment failed to garner the five votes needed to clear the eight-person Assembly Committee. *Id.*

Senate Criminal Procedure Committee rejected Senator Calderon's proposal.²²

Proposals to abandon the unanimity requirement have made their way into the California legislature before, only to fail.²³ However, a number of disappointing high-profile cases in recent years and the unprecedented media coverage accompanying the Simpson trial have inspired a larger grassroots movement supporting the amendment.²⁴ In addition, public approval for eliminating the requirement is solid and appears to be growing stronger.²⁵

Citizens for a Safer California, including Fred Goldman, the father of murder victim Ronald Goldman, led the most recent push for change.²⁶ The group was campaigning to place an initiative on the November 1996 ballot to amend the California Constitution to provide for nonunanimous jury verdicts of 10-2.²⁷ Labeled the Public Safety Protection Act of 1996, the initiative was to appear on the ballot if supporters gathered the signatures of 693,230 registered voters by April 10, 1996.²⁸ Due to a lack of time and money, however, backers of the initiative were forced to halt their campaign.²⁹

22. Bill Ainsworth, *Committee Favors Unanimous Juries In Criminal Cases*, RECORDER, June 28, 1995, at 1.

23. In 1984 Los Angeles County District Attorney Robert Philibosian tried to get nonunanimous juries approved by the state legislature and failed. See Josh Meyer, *Non-Unanimous Jury Idea Appeals to Some Reformers*, L.A. TIMES, Sept. 28, 1994, at A12 [hereinafter Meyer, *Reformers*].

24. Among those leading the movement are Mike Reynolds, the Fresno photographer who led the successful "Three Strikes" initiative campaign, and the California District Attorney's Association. Reynolds Holding, *Criminal Obsession*, S.F. CHRON., Feb. 5, 1995, at 1.

25. In a telephone survey of 1008 Californians, 71% of those questioned favor abolishing the unanimity requirement. Claire Cooper, *Many Favor Ending Jury Unanimity*, SACRAMENTO BEE, Sept. 12, 1995, at B1.

26. *Fred Goldman Campaigns to Reform Judicial System*, L.A. TIMES, Nov. 17, 1995, at B4 [hereinafter *Fred Goldman*]. Ronald Goldman was one of the victims involved in the murder trial of O.J. Simpson; Simpson was ultimately acquitted of charges that he killed Goldman. *Id.*

27. *Backers of Verdicts Proposal to Begin Seeking Signatures*, L.A. TIMES, Nov. 15, 1995, at A28 [hereinafter *Backers*]. The initiative would also repeal the Prisoner's Bill of Rights and would eliminate conjugal visits for murderers and sex offenders. *Citizens for a Safer California: Violent Sexual Predator to Remain in Prison*, PR Newswire, Dec. 14, 1995, available in WL, USNEWS Database.

28. *Backers*, *supra* note 27, at A28.

29. *Supporters of Jury Initiative to Allow Convictions By 10 Members Halt Campaign*, L.A. TIMES, Feb. 16, 1996, at A23. Citizens for a Safer California has not given up its campaign and members hope to "restart the clock by refiling the initiative with the

California's unanimity requirement affords a protection not guaranteed by the United States Constitution.³⁰ Whereas the Supreme Court has ruled that the Sixth Amendment right to a jury trial applies to the states via the Fourteenth Amendment,³¹ the federally mandated jury unanimity requirement does not.³² The holding allows states to choose whether to require unanimous verdicts. Consequently, two states currently allow for a supermajority verdict in all but capital punishment cases.³³

Since California has the power to eliminate the unanimity requirement from its constitution, the remaining question is whether this would be a wise decision. Proponents of the amendment point to California's high hung jury rate, which ranges from ten to fifteen percent of all cases tried.³⁴ In addition, the costs of retrial can be exorbitant.³⁵ Opponents of the amendment are quick to point out that the jury is one of the most important institutions we have in this country, standing as a check on oppression by the state.³⁶

This Comment will evaluate the current proposals to eliminate the jury unanimity requirement from California criminal jury trials.

attorney general's office in the very near future." *Id.*

30. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

31. *Duncan v. Louisiana*, 391 U.S. 145, 149, *reh'g denied*, 392 U.S. 947 (1968).

32. The Court ruled that in federal trials, "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." *Andres v. United States*, 333 U.S. 740, 748 (1948). However, the unanimity requirement does not extend to state criminal jury trials. *Johnson*, 406 U.S. at 363.

33. The Oregon Constitution provides that "[i]n all criminal prosecutions . . . in the circuit court[,] ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise." OR. CONST. art. I, § 11.

The Louisiana Constitution provides that:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.

LA. CONST. art. 1, § 17.

34. Jason L. Riley, *Should a Jury Verdict Be Unanimous?*, WALL ST. J., Nov. 22, 1995, at A11.

35. *Id.* Counties spend anywhere from \$5000 to \$10,000 to retry cases. Gonzales, *supra* note 5, at 1A.

36. See Erwin Chemerinsky, *Nixing Nonunanimous Juries*, L.A. DAILY NEWS, Nov. 5, 1995, at 3 [hereinafter Chemerinsky, *Nixing*]; Bruce Fein, *The Unanimous Verdict Is Essential for Fairness*, L.A. TIMES, Aug. 18, 1995, at B9. See generally *Duncan*, 391 U.S. at 151-58 (discussing the history and importance of the jury trial in England and the United States).

Part II summarizes the origins of the unanimity requirement in the United States, discussing its applicability on both the federal and state levels. Part III focuses on the history of the unanimity requirement in California. Since its passage into statehood, unanimity of verdict has been an essential attribute of the California jury trial. Part IV presents the arguments of both opponents and proponents of the proposed constitutional amendment in California. Part V evaluates these arguments in the context of the jury system and the criminal justice system as a whole. What is the purpose of the jury system and will this purpose be furthered in the absence of the unanimity requirement? Finally, in Part VI, this Author concludes that elimination of the unanimity requirement, while constitutional, threatens the effectiveness of the California jury system and jeopardizes the credibility of the legal system. The benefit derived from decreased hung jury rates and cost reductions do not outweigh the risk of convicting innocent people, damaging the process of jury deliberation, and detrimentally minimizing the burden of proof that prosecutors must carry to convict.

II. ORIGINS OF THE UNANIMITY REQUIREMENT

The origins of the unanimity requirement are far from certain and various theories abound.³⁷ The first unanimous jury verdict was recorded in 1367.³⁸ In *Apodaca v. Oregon*³⁹ Justice White wrote that the requirement arose during the Middle Ages.⁴⁰ By the latter half of the fourteenth century, unanimous verdicts were required in

37. *Apodaca v. Oregon*, 406 U.S. 404, 407 n.2 (1972). Justice White, in his majority opinion, posits four possible theories for the birth of the unanimity requirement. One theory is that the rule was designed to compensate for lack of procedural safeguards ensuring that the defendant received a fair trial. *Id.* A second theory is that the rule developed from the practice of afforcement of the jury which was firmly established by the late 14th century. *Id.* This term merely meant that a sufficient number were to be added to the panel until 12 were at last found to agree in the same conclusion. *Id.* Third, it is possible that unanimity developed because "early juries, unlike juries today, personally had knowledge of the facts of a case; the medieval mind assumed there could be only one correct view of the facts, and, if either all the jurors or only a minority thereof declared the facts erroneously, they might be punished for perjury." *Id.* Finally, unanimity may have arisen out of the medieval concept of consent which carried with it the idea of unanimity. *Id.*

38. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 179 (1994).

39. 406 U.S. 404 (1972).

40. *Id.* at 407.

all criminal trials.⁴¹ The rule became “an accepted feature of the common-law jury by the 18th century.”⁴²

Early state constitutions reflected common law acceptance of the unanimity rule. Four eighteenth-century state constitutions expressly mandated unanimous jury verdicts in criminal cases,⁴³ while others “provided for trial by jury according to the course of the common law.”⁴⁴

In drafting the Constitution, the Framers provided for a right to trial by jury in the Sixth Amendment.⁴⁵ The drafters did not, however, expressly include a unanimity requirement.⁴⁶ The absence of the requirement in the final version of the Sixth Amendment has inspired much debate. Jury unanimity supporters maintain that the Framers purposefully left out the rule since it was clearly “implicit in the very concept of jury.”⁴⁷ This argument rests on the historical pedigree of the rule and the fact that at common law, when the Constitution was adopted, most of the states required unanimous jury verdicts in criminal cases. But the Framers’ silence can also be viewed as intending to have a substantive effect on the law.⁴⁸ Clearly the Framers knew how to specify which aspects of the

41. *Id.* at 407 n.2.

42. *Id.* at 408.

43. *Id.* at 408 n.3 (citing N.C. CONST. of 1776, art. IX; PA. CONST. of 1776, art. IX; VT. CONST. of 1786, art. XI; VA. CONST. of 1776 § 8).

44. *Id.* For example, Maryland’s constitution provided for trial by jury according to the course of the common law while the constitutions of Delaware, Kentucky, and South Carolina required jury trials to remain as heretofore. *Id.*

45. The Sixth Amendment guarantees

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

46. Interestingly enough, James Madison initially introduced the Sixth Amendment in the House of Representatives, providing for trial “by an impartial jury of freeholders of the vicinage, with the requisite of *unanimity* for conviction, of the right of challenge, and other accustomed requisites.” 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789) (emphasis added). Although the proposal passed the House, the Senate altered it and then sent it back to a House conference committee. *Apodaca*, 406 U.S. at 409. The committee ultimately adopted the Sixth Amendment as it stands in its current form. *Id.*

47. *Apodaca*, 406 U.S. at 410.

48. *Id.*

common-law jury trial were to apply to the new Union.⁴⁹ The question, then, is why did they not expressly provide for a unanimity requirement? One explanation is that Congress, knowing that four states did not require unanimity, was unwilling to force another affirmative duty upon those states.⁵⁰

A. *Jury Unanimity at the Federal Level*

The Supreme Court has repeatedly held that jury unanimity is one of the fundamental requirements of a federal jury trial.⁵¹ In *American Publishing Co. v. Fisher*⁵² the Court found unanimity was one of the essential elements of a jury trial at common law and, since "every litigant in a common law action in the courts of the Territory of Utah [had] the right to a trial by jury,"⁵³ any statutory enactment which abridged the right was unconstitutional.⁵⁴

In *Thompson v. Utah*⁵⁵ the Court held that since the common law required a twelve-person unanimous jury, the Sixth Amendment included the same requirement.⁵⁶ The Court relied heavily on historical pedigree in its opinion, including references to the Magna Carta, Nathan Hale, and Lord Bacon's Abridgment.⁵⁷

In *Patton v. United States*⁵⁸ the Court interpreted "trial by jury," as used in the Sixth Amendment, to be "a trial . . . as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution

49. The Framers were quite detailed in drafting the Sixth Amendment and it appears that they knew exactly which elements of the common-law jury trial they wished to carry over into the new union. *Id.*; *Williams v. Florida*, 399 U.S. 78, 97 (1970).

50. Jacob Tanzer, *Unanimity Isn't Human Nature*, L.A. TIMES, Aug. 18, 1995, at B9. Jacob Tanzer was the prosecutor who successfully argued that the state of Oregon was constitutionally authorized to provide for less than unanimous jury convictions.

51. See *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748-49 (1948); *Patton v. United States*, 281 U.S. 276, 288-90 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78 (1970); *American Publishing Co. v. Fisher*, 166 U.S. 464, 467-68 (1897).

52. 166 U.S. 464 (1897). *Fisher* involved a statute which allowed for conviction upon the vote of only nine jurors. *Id.* at 465.

53. *Id.* at 468.

54. *Id.* at 467-68. It is interesting to note that the *Fisher* Court made plain that it did not confront whether jury unanimity could be abolished by a state statute. *Id.*

55. 170 U.S. 343 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37 (1990).

56. *Id.* at 355.

57. *Id.* at 349-50.

58. 281 U.S. 276 (1930).

was adopted.”⁵⁹ The *Patton* Court determined that unanimity was one of these “essential elements.”⁶⁰

Finally, in *Andres v. United States*⁶¹ the Court held that in criminal cases where the Sixth or Seventh Amendments apply, all issues left to the jury must be decided unanimously.⁶² In *Andres* the Court had to construe a federal regulation, which allowed a jury to qualify a guilty verdict by adding the words “without capital punishment.”⁶³ The lower courts issued a jury instruction requiring the jury to unanimously qualify the verdict; otherwise the defendant would be sentenced to death.⁶⁴ One of the major issues facing the Court was whether the jury had to return a unanimous decision as to both guilt of the defendant and qualification of the verdict.⁶⁵

The government interpreted the statute as providing that if the jury could not unanimously qualify the verdict, the defendant’s guilt would stand and the death penalty would automatically be imposed.⁶⁶ Petitioner argued that jury unanimity was required on all issues relevant to the defendant’s adjudication, including capital punishment.⁶⁷

The Court held that jury unanimity was required as to “all issues—character or degree of the crime, guilt and punishment—which are left to the jury.”⁶⁸ The statute was not, however, to be construed to require a unanimous decision on qualification of the verdict.⁶⁹ The Court’s decision derived in a large part from “the general humanitarian purpose of the statute and the history of the Anglo-American jury system.”⁷⁰

59. *Id.* at 288. The Court stated that a “trial by jury” includes the following three elements: (1) that the jury should consist of 12 men; (2) that the trial should be in the presence of a judge; and (3) that the verdict shall be unanimous. *Id.*

60. *Id.*

61. 333 U.S. 740 (1948).

62. *Id.* at 748.

63. The statute involved read as follows:

In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto ‘without capital punishment’; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

Id. at 742 n.1.

64. *Id.* at 750-51.

65. *Id.* at 748-49.

66. *Id.*

67. *Id.*

68. *Id.* at 748.

69. *Id.*

70. *Id.* at 749.

In those cases finding that jury unanimity is constitutionally required in federal criminal trials, the Court had relied primarily on the historical acceptance of the rule at common law.⁷¹ While the text of the Constitution does not expressly provide for unanimity, the Supreme Court has construed the Sixth and Seventh Amendments, when applicable in federal proceedings, as providing for a common-law jury trial.⁷²

B. Jury Unanimity at the State Level

While unanimity is clearly the rule at the federal level, the Supreme Court has repeatedly rejected attempts to mandatorily impose this requirement upon the states and has left the decision up to state legislatures and citizenry. In *Maxwell v. Dow*⁷³ Justice Peckham stated:

[W]hen providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that [the states] should have the right to decide for themselves what shall be the form and character of the procedure in such trials[,] . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not.⁷⁴

Twelve years later, in *Jordan v. Massachusetts*,⁷⁵ the Court held that "[i]n criminal cases due process of law is not denied by a state law which dispenses with . . . the necessity of a jury of twelve, or unanimity in the verdict."⁷⁶ Both *Maxwell* and *Jordan* were precursors to the accepted rule that the states have authority to devise their own jury systems.

In 1972 the Supreme Court seemingly ended the debate over whether the states were constitutionally required to provide for unanimous jury verdicts in criminal trials. Two decisions handed down simultaneously, upheld state constitutional provisions for less than unanimous verdicts. *Apodaca v. Oregon*⁷⁷ involved Oregon's

71. See, e.g., *Patton*, 281 U.S. at 288-89; *Thompson*, 170 U.S. at 346-47; *Fisher*, 166 U.S. at 467-68.

72. *Patton*, 281 U.S. at 288; *Thompson*, 170 U.S. at 355; *Fisher*, 166 U.S. at 467-68.

73. 176 U.S. 581 (1900).

74. *Id.* at 605.

75. 225 U.S. 167 (1912).

76. *Id.* at 176.

77. 406 U.S. 404 (1972).

constitutional provision allowing for 10-2 verdicts in all but capital punishment cases.⁷⁸ The defendant was convicted of assault, burglary, and grand larceny on an 11-1 jury count.⁷⁹ The defendant appealed on the grounds that his conviction by less than a unanimous verdict violated his Sixth Amendment right to trial by jury.⁸⁰ Further, the defendant argued that unanimity was essential in order to give substance to the reasonable doubt standard mandated by the Due Process Clause.⁸¹

The Court rejected all of these arguments.⁸² In response to the Sixth Amendment argument, the Court held that in terms of the underlying functions of the jury, there is "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one."⁸³ As for the reasonable doubt argument, the Court held that the Sixth Amendment had never been interpreted to require proof beyond a reasonable doubt in criminal cases;⁸⁴ since the text of the Amendment itself does not provide for a reasonable doubt standard in criminal trials, the defendant's argument was unfounded.⁸⁵

On the same day it handed down *Apodaca*, the Court delivered its opinion in *Johnson v. Louisiana*.⁸⁶ In *Johnson* the defendant was convicted of robbery by a 9-3 verdict, as authorized by the Louisiana Constitution and Code of Criminal Procedure for cases where the crime is necessarily punishable by hard labor.⁸⁷ The defendant challenged the Louisiana Constitution and criminal statutory scheme for jury trials, arguing that both violated his due process rights under the Fourteenth Amendment.⁸⁸ The crux of defendant's argument

78. See *supra* note 33.

79. *Apodaca*, 406 U.S. at 405-06.

80. *Id.* at 406.

81. *Id.* at 411. In 1970 the Supreme Court held that guilt must be proven "beyond a reasonable doubt" in order to secure a conviction under the Due Process Clause of the 14th Amendment. *In re Winship*, 397 U.S. 358, 364 (1970).

82. *Apodaca*, 406 U.S. at 411-12.

83. *Id.* at 411.

84. *Id.*

85. *Id.*

86. 406 U.S. 356 (1972).

87. *Id.* at 357.

88. *Id.* at 359. The Louisiana Constitution provided:

Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of

was identical to *Apodaca*'s: In order to give substance to the reasonable doubt standard, jury unanimity is required.⁸⁹

The Court rejected the defendant's arguments using virtually identical reasoning as in *Apodaca* and held that conviction by a 9-3 verdict is not unconstitutional.⁹⁰ The Court noted that it "ha[d] never held jury unanimity to be a requisite of due process of law"⁹¹ and that the reasonable doubt standard coexisted with Supreme Court decisions rejecting the idea that unanimity was a requisite element of due process.⁹² In addition, the Court reasoned that a verdict rendered by nine jurors represents a "substantial majority" of the jury, enough to overcome the doubts of the three dissenting jurists.⁹³

The decisions in *Apodaca* and *Johnson* and the line of cases leading up to them established the general rule that states are free to determine the size and structure of their jury systems and may authorize less than unanimous verdicts. As Justice Fortas noted in *Bloom v. Illinois*,⁹⁴

[there is] no reason whatever . . . to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.⁹⁵

twelve, all of whom must concur to render a verdict.

LA. CONST. of 1921, art. VII, § 41.

The Louisiana Code of Criminal Procedure provides that

[c]ases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.

LA. CODE CRIM. PROC. ANN. art. 782 (amended 1974).

89. *Johnson*, 406 U.S. at 359.

90. *Id.* at 359-63.

91. *Id.* at 359; see also *Maxwell*, 176 U.S. at 602 (holding that the states have the ability to determine the manner in which state civil or criminal trials are to be tried); *Jordan*, 225 U.S. at 176 (holding that "[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict").

92. *Johnson*, 406 U.S. at 359.

93. *Id.* at 362 ("In our view, disagreement of three jurors does not alone establish reasonable doubt.").

94. 391 U.S. 194 (1968) (Fortas, J., concurring).

95. *Id.* at 213 (Fortas, J., concurring).

Therefore, providing for a less than unanimous verdict will not deprive defendants of their Sixth Amendment right to a criminal jury trial.

Given that the states are free to accept or reject the unanimity requirement, the only remaining issue facing California is whether abolishing the rule would benefit criminal justice without eroding the historical protections traditionally interposed between the defendant and the government.

III. HISTORY OF THE UNANIMITY REQUIREMENT IN CALIFORNIA

A. *Common Law Origins of California's Unanimity Requirement*

The unanimity requirement has been a necessary component of California jury trials since California's passage into statehood in 1850. Article I, section 16 of the California Constitution, which provides for the right to a jury trial, has been interpreted as extending the right as it had existed at common law, prior to the adoption of the California Constitution.⁹⁶ At common law, verdict unanimity was one of the essential attributes of the jury trial and, upon passage of the California Constitution, the unanimity requirement became a part of California criminal procedure.

While the California Constitution does not expressly provide for a "common law" jury trial, the Framers, as well as the citizens who voted to adopt the Constitution, intended that jury trials be provided as they had been at English common law.⁹⁷ In the course of discussing the California Constitution's jury trial provision, the *Powell* court noted:

[The Constitution's] framers were, with few exceptions, from states where the common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right

96. See *infra* notes 97-124 and accompanying text.

97. *People v. Powell*, 87 Cal. 348, 354-55, 25 P. 481, 483 (1891). The *Powell* court noted that the California Constitution does not define the right to a jury trial. Rather, "[i]t was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured, and remain inviolate." *Id.* at 355, 25 P. at 483.

secured as the right there known and there held inviolate. It is in this common-law sense that the language has always been regarded by the courts of this state.⁹⁸

The California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all."⁹⁹ This fundamental right to a jury trial applies in all actions, both civil and criminal, which were recognizable at common law prior to the adoption of the constitution.¹⁰⁰ While the legislature may "establish reasonable regulations or conditions on the enjoyment of the right,"¹⁰¹ it must ensure preservation of the essential elements of a jury trial.¹⁰² Any legislative action that abridges the right is unconstitutional and void.¹⁰³

Although the California Constitution does not expressly define the "essential elements" of a jury trial, it is well established that the type of jury trial guaranteed by the California Constitution is that which existed at common law in 1850, when the state Constitution was adopted.¹⁰⁴

The provision of our Bill of Rights that the right of trial by jury is to *remain* inviolate means that all the substantial incidents and consequences which pertain to the right of trial by jury at common law are beyond the reach of hostile

98. *Id.* at 356, 25 P. at 483-84.

99. CAL. CONST. art. I, § 16.

100. *Ex parte Liggett*, 187 Cal. 428, 430, 202 P. 660, 661 (1921); *Cline v. Superior Court*, 184 Cal. 331, 339, 193 P. 929, 932 (1920); *Tibbitts v. Fife*, 162 Cal. App. 2d 568, 571, 328 P.2d 212, 214 (1958); *Sonleitner v. Superior Court*, 158 Cal. App. 2d 258, 259, 322 P.2d 496, 497 (1958); *Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 128, 302 P.2d 397, 400 (1956).

However, the right to trial by jury should not be narrowly construed. "It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of *like nature* as may afterwards arise." *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 300, 231 P.2d 832, 844 (1951) (emphasis added).

101. *People v. Collins*, 17 Cal. 3d 687, 692, 552 P.2d 742, 745, 131 Cal. Rptr. 782, 785 (1976), *cert. denied*, 429 U.S. 1077 (1977).

102. *Id.*

103. *Id.*; *Chevrolet Coupe*, 37 Cal. 2d at 287, 231 P.2d at 835; *People v. Kelly*, 203 Cal. 128, 133, 263 P. 226, 228 (1928); *People v. Richardson*, 138 Cal. App. 404, 408, 32 P.2d 433, 435-36 (1934); *Peete v. Peete*, 54 Cal. App. 333, 363-64, 202 P. 51, 65 (1921).

104. *Collins*, 17 Cal. 3d at 692, 552 P.2d at 745, 131 Cal. Rptr. at 785; *Chevrolet Coupe*, 37 Cal. 2d at 286-87, 231 P.2d at 835; *Kelly*, 203 Cal. at 133, 263 P. at 228; *Cline*, 184 Cal. at 339, 193 P.2d at 932; *Martin v. Superior Court*, 176 Cal. 289, 293, 168 P. 135, 136-37 (1917); *People v. Oliver*, 196 Cal. App. 3d 423, 429, 241 Cal. Rptr. 804, 807 (1978).

The phrase "common law" refers to the whole body of English common law, as influenced by statute, which existed at the time the California Constitution was adopted. *Chevrolet Coupe*, 37 Cal. 2d at 287, 231 P.2d at 835; *Martin*, 176 Cal. at 293, 168 P. at 136; *Richardson*, 138 Cal. App. at 408, 32 P.2d at 435.

legislation and are preserved in their ancient, substantial extent as they existed at common law.¹⁰⁵

At that time, the common-law jury included three essential elements:¹⁰⁶ number of jurors,¹⁰⁷ impartiality of jurors,¹⁰⁸ and unanimity of verdict.¹⁰⁹

The unanimity requirement, then, is a product of English common law, carried over into California law with the adoption of the California Constitution. In *People v. Superior Court*¹¹⁰ the California Supreme Court authoritatively held that "[t]he Constitution guarantees the fundamental right to a unanimous verdict" and that each juror must reach their own independent judgment in the verdict.¹¹¹ In that case the trial court declared a mistrial upon discovering that one of twelve jurors in a murder trial had not reached his own decision in the verdict to convict.¹¹² According to the juror, he "went with the majority."¹¹³ The trial court immediately declared a mistrial and the Supreme Court affirmed on the ground that "[a]cquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted, would undermine the right to a unanimous verdict."¹¹⁴

Subsequent California Supreme Court decisions reconfirm the unanimity requirement's vitality and continued necessity in California jury trials. In *People v. Feagley*¹¹⁵ the court declared unconstitution-

105. *Peete*, 54 Cal. App. at 363-64, 202 P. at 65.

106. The three essential elements are number, impartiality, and unanimity. *Richardson*, 138 Cal. App. at 408-09, 32 P.2d at 436; *Peete*, 54 Cal. App. at 366, 202 P. at 66.

107. The required number of jurors for both civil and criminal trials can be found in article 1, § 16 of the California Constitution. See *Collins*, 17 Cal. 3d at 693, 552 P.2d at 746, 131 Cal. Rptr. at 786 ("The elements of number and unanimity combine to form an essential element of unity in the verdict.").

108. See *People v. Wheeler*, 22 Cal. 3d 258, 265, 583 P.2d 748, 754, 148 Cal. Rptr. 890, 895 (1978) ("Section 16 of article 1 does not explicitly guarantee trial by an 'impartial' jury, as does the Sixth Amendment to the federal Constitution; but that right is no less implicitly guaranteed by our charter, as the courts have long recognized."); *People v. Galloway*, 202 Cal. 81, 93, 259 P. 332, 337 (1927) (holding that defendant's constitutional right to a jury trial was violated when juror failed to reveal a prejudice toward the defendant).

109. *Collins*, 17 Cal. 3d at 693, 552 P.2d at 745, 131 Cal. Rptr. at 785; *People v. Superior Court*, 67 Cal. 2d 929, 932, 434 P.2d 623, 625, 64 Cal. Rptr. 327, 329 (1967).

110. 67 Cal. 2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967).

111. *Id.* at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329.

112. *Id.* at 931, 434 P.2d at 624, 64 Cal. Rptr. at 328.

113. *Id.*

114. *Id.* at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329.

115. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

al—on equal protection grounds—a “mentally disordered sex offenders” law which permitted commitment on a three-fourths jury verdict.¹¹⁶ Another California statute, the Lanterman-Petris-Short Act (LPS),¹¹⁷ provided for the commitment of an individual on the ground that he or she is an “imminently dangerous person” only upon a unanimous jury verdict.¹¹⁸ The court reasoned that since the right to a unanimous verdict is fundamental, the state had to put forward a compelling interest justifying “[the] distinction between the rights of mentally disordered sex offenders and those of persons committed under the LPS Act, and that the distinction is necessary to further such purpose.”¹¹⁹ Finding no such compelling state interest, the court found the law unconstitutional.¹²⁰

The court in *People v. Collins*¹²¹ reiterated the basic principle that unanimity is required in jury verdicts and additionally provided that “[t]he requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them.”¹²² Two years later the court in *People v. Wheeler*,¹²³ citing both *Feagley* and *People v. Superior Court*, held that “[i]t is settled that in criminal cases the right [to a jury trial] includes in this state the right to a unanimous verdict” and the verdict must be rendered by impartial and unprejudiced jurors.¹²⁴

Since its passage into statehood and its adoption of the constitution, California has provided for jury trials as they existed at common law in 1850. Unanimity of verdict was required in 1850 and continues as a requirement today.

B. Prior Attacks on the Unanimity Requirement

Current efforts to amend the California Constitution do not represent the first attack on the state’s unanimity requirement. In the early 1980s the Senate Judiciary Committee rejected a proposed

116. *Id.* at 358, 535 P.2d at 386, 121 Cal. Rptr. at 522.

117. CAL. WELF. & INST. CODE §§ 5000-5599 (West 1969 & Supp. 1996).

118. *Id.* § 5303.

119. *Feagley*, 14 Cal. 3d at 356, 535 P.2d at 384, 121 Cal. Rptr. at 520.

120. *Id.* at 358, 535 P.2d at 386, 121 Cal. Rptr. at 522.

121. 17 Cal. 3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976).

122. *Id.* at 693, 552 P.2d at 746, 131 Cal. Rptr. at 786.

123. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

124. *Id.* at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.

constitutional amendment, and a state initiative came very close to reaching the November 1984 ballot.¹²⁵

The Senate measure would have allowed for jury decisions on 10-2 or 11-1 votes in criminal cases not involving the death penalty.¹²⁶ Authored by former California Senator Robert Presley (D-Riverside) and sponsored by former Los Angeles County District Attorney Robert Philibosian, the Senate Judiciary Committee "soundly rejected" the measure by a 2-6 vote.¹²⁷ Opponents of the measure argued that the amendment, if passed, would "lead to less jury deliberation . . . and [would] undermine public confidence in the strength of the justice system."¹²⁸

In addition to the Senate proposal, Philibosian, joined by Los Angeles Sheriff Sherman Block and former State Attorney General Evelle Younger, played a key role in the movement to place the "Speedy Trial Initiative" on the November 1984 ballot.¹²⁹ The proposed court reform initiative would have allowed for 10-2 or 11-1 acquittals or convictions along with a number of other changes in the criminal justice system.¹³⁰

The Speedy Trial Initiative failed to qualify for the November 1984 ballot.¹³¹ Backers came up 30,000 to 80,000 signatures short of the required 630,136.¹³² Proponents of the initiative attributed the measure's failure to a lawsuit brought by the League of Womens' Voters and former O.J. Simpson defense lawyer Gerald Uelman.¹³³ The lawsuit alleged that Philibosian, Block, and others used county

125. See *infra* notes 126-34 and accompanying text.

126. UPI, Sept. 22, 1983, AM Cycle, *available in* LEXIS, Nexis Library, UPI File.

127. UPI, Jan. 24, 1984, AM Cycle, *available in* LEXIS, Nexis Library, UPI File.

128. *Id.*

129. UPI, Feb. 11, 1984, BC Cycle, *available in* LEXIS, Nexis Library, UPI File.

130. In addition to allowing nonunanimous jury verdicts, the initiative provided that court proceedings could be delayed only for "just cause" and that judges rather than lawyers would conduct questioning in jury selection. UPI, Sept. 22, 1983, AM Cycle, *available in* LEXIS, Nexis Library, UPI File. Furthermore, the initiative proposed to streamline procedures in preliminary proceedings and dismiss cases in which more than six but fewer than ten jurors favored acquittal. *Id.*

131. UPI, Feb. 11, 1984, BC Cycle, *available in* LEXIS, Nexis Library, UPI File.

132. *Id.*

133. Ronald K.L. Collins, *Government by Popular Initiative: States Amend Their Constitutions*, NAT'L L.J., June 18, 1984, at 14, 34. Prior to the suit initiated by the League of Women Voters, former Governor Edmund Brown, Jr. filed suit against Philibosian, Block, and 15 other county officials, alleging violations of the Ralph Brown Act, which prohibits private meetings concerning public business. UPI, Apr. 4, 1983, AM Cycle, *available in* LEXIS, Nexis Library, UPI File.

funds and resources to discuss, draft, and provide support for the initiative in violation of the Political Reform Act.¹³⁴

Despite the failure of the Senate measure and the public initiative, both efforts demonstrate that opposition to the unanimity requirement in California has historical roots and that given the right political setting, constitutional change may become a reality.

IV. PRESENTING THE ARGUMENTS: UNANIMITY VS. THE NONUNANIMOUS VERDICT

The proposed constitutional amendments have drawn their share of criticism from both sides of the unanimity debate. While it is difficult to determine the relative merit of any one argument, taken as a whole, the positions advanced by both supporters and opponents of the proposals are persuasive. The attraction of both sides stems from a common goal: maintaining the integrity of the judicial system.¹³⁵

Clearly the jury system has rendered some controversial decisions over the past few years, causing public confidence in criminal justice to waver.¹³⁶ The initial reaction to these decisions has been to look at the system and ask why it is producing such questionable results. While almost everyone agrees that the system could use some improvement, not everyone agrees on the more difficult question of how to effect this improvement.

However difficult the issue, though, use of the constitutional amendment process should be reserved for only the most pressing and necessary changes.¹³⁷ Lawmakers must have a firm grasp of the issues and potential ramifications of the proposed change when they cast their votes.¹³⁸ Voters, too, may face the unanimity question; they have a responsibility to sift through the arguments and determine

134. *League of Women Voters v. Countywide Criminal Justice Coordination Comm.*, 203 Cal. App. 3d 529, 250 Cal. Rptr. 161 (1988).

135. Unanimity proponents believe that preservation of the requirement assures the public that the jury is truly deliberating and that justice is being served. *See, e.g.*, Fein, *supra* note 36, at B9. However, opponents feel that elimination of the requirement will restore the public's lost confidence in the criminal justice system. *See, e.g.*, Calderon, *supra* note 9, at 10A.

136. Cathleen Decker, *Faith in Justice System Drops*, L.A. TIMES, Oct. 8, 1995, at S2 ("[P]ublic perception of the courts [has] . . . been tarnished by the host of controversial trials that have occurred here in recent years.").

137. Chemerinsky, *Nixing*, *supra* note 36, at 3 (arguing that "changing the state Constitution after 150 years surely should require a showing of a substantial problem").

138. *Id.*

for themselves whether California really needs to change its constitution, a document which has been in place for nearly 150 years.

The following presents a brief summary of the key issues comprising both sides of the unanimity debate.

A. Arguments in Favor of Nonunanimous Verdicts

1. History does not mandate continued acceptance of the unanimity rule

One of the primary arguments against the proposed constitutional amendments is that they will eliminate a defining requirement of California's criminal jury trials, which has commanded support for over 700 years, dating back to the common law.¹³⁹ In effect the rule's "historical pedigree" justifies its continued acceptance. As noted by Jeffrey Abramson,

[f]or over six hundred years, the unanimous verdict has stood as a distinctive and defining feature of jury trials. The first recorded instance of a unanimous verdict occurred in 1367; when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die in prison than consent to convict.¹⁴⁰

In his dissent in *Johnson v. Louisiana*,¹⁴¹ Justice Douglas stated that "[t]he unanimous jury has been so embedded in our legal history that no one would question its constitutional position."¹⁴² Douglas is not alone in this presumption of constitutionality. William Blackstone wrote that conviction of the accused should be "confirmed by the unanimous suffrage of 12 of his equals" and that this requirement should remain "sacred and inviolate."¹⁴³ Justice Story also believed that unanimity was an essential constitutional guarantee, reasoning that "[a] trial by jury is generally understood to mean . . . a trial by a jury of *twelve* [men], impartially selected, who must *unanimously* concur in the guilt of the accused before a legal

139. *Id.*

140. ABRAMSON, *supra* note 38, at 179.

141. 406 U.S. 356 (1972).

142. *Id.* at 382 n.1 (Douglas, J., dissenting).

143. Bill Boyarsky, *Balky Trial Could Ignite Move to Radically Alter Jury System*, L.A. TIMES, April 25, 1995, at A18 [hereinafter Boyarsky, *Balky Trial*] (citing WILLIAM BLACKSTONE, COMMENTARIES (1769)).

conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional."¹⁴⁴

While historical acceptance lends credibility to the unanimity requirement, this type of justification begs the question of why we should continue to adhere to the rule today. Is it enough to say that since the rule is deeply rooted in history it should remain so today? Or is this blind faith?

a. historical inertia is no justification for continued adherence to the unanimity rule

The Supreme Court has repeatedly rejected historical constructions of constitutional amendments wherein the proponent merely points to the existence of a practice or procedure at common law and then argues that acceptance then requires acceptance now. In *Hurtado v. California*¹⁴⁵ Justice Harlan argued in dissent that to apply a sterile historical approach to constitutional construction "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."¹⁴⁶

The authors of the proposed constitutional amendments agree that historical inertia should not prevent change.¹⁴⁷ In support of their movement for change, proponents of the nonunanimous verdict place great emphasis on the fact that England, the historical benchmark for the unanimity requirement, no longer requires unanimous verdicts.¹⁴⁸

Beyond England, nonunanimous verdicts are the rule in Scotland,¹⁴⁹ Australia,¹⁵⁰ and Norway¹⁵¹ as well as in Oregon and

144. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 559 n.2 (5th ed. 1891).

145. 110 U.S. 516 (1884).

146. *Id.* at 529 (Harlan, J., dissenting).

147. *E.g.*, A.C.A. 18, *supra* note 18, at 3.

148. *Id.*; Bill Boyarsky, *Unanimous Verdicts Also On Trial*, L.A. TIMES, July 19, 1995, at A1 [hereinafter Boyarsky, *On Trial*]; Tanzer, *supra* note 50, at B9. England eliminated the unanimity requirement by statute in 1967. Criminal Justice Act, 1967, ch. 80, § 13 (Eng.) (repealed 1974). For the text of the current English statute providing for majority verdicts, see Juries Act, 1974, ch. 23, § 17 (Eng.).

149. FORSYTH, *supra* note 1, at 279-80.

150. Tanzer, *supra* note 50, at B9.

151. In Norway, juries are composed of ten members, seven of whom must agree for a conviction. Bill McClellan, TELLING NORWEGIANS ABOUT O.J. ISN'T EASY, ST. LOUIS POST DISPATCH, Oct. 2, 1994, at A1.

Louisiana here in the United States.¹⁵² Simply stated, the unanimity requirement has lost its historical sanctity in the United States, England, and abroad, and it is no longer presumed that a constitutional state jury trial must include the right to a unanimous verdict.

However, Supreme Court decisions affirming a state's right to provide for a nonunanimous jury verdict do not stand for the proposition that nonunanimous verdicts are the best or even the most efficient means of pursuing criminal justice.¹⁵³ Constitutionality is not conclusive proof of sufficiency or wisdom. Each state must still individually determine whether elimination of the rule is a necessary step or an unnecessary evil.¹⁵⁴

b. the unanimity requirement is a historical accident

Another argument countering the historical pedigree justification is that like the twelve-person jury requirement, unanimity is nothing more than a historical accident.¹⁵⁵ According to Patrick Devlin, the answer to the question of the origin of the unanimity requirement is that "no one ever planned that it should be that way; the rule is simply an antique."¹⁵⁶ Many historians agree that the evolution of the requirement was by chance.¹⁵⁷

If the unanimity requirement is merely a historical accident, this militates against placing so much importance in the rule.¹⁵⁸ United States constitutional law should be based on solid principles which have been forged at the anvil of time and adapted to the changing environment.¹⁵⁹ Rules that are the product of historical flukes are no match for the sound and reasoned judgment of the states.

152. See *supra* note 33 for the text of the Oregon and Louisiana constitutions.

153. For a general discussion of the unanimity requirement by the Supreme Court, see *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972).

154. *Johnson*, 406 U.S. at 372-73; *Duncan v. Louisiana*, 391 U.S. 145, 213, *reh'g denied*, 392 U.S. 947 (1968); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

155. *State v. Gann*, 463 P.2d 570, 573 (Or. 1969).

156. PATRICK DEVLIN, *TRIAL BY JURY* 48 (1956).

157. *Gann*, 463 P.2d at 573.

158. *Id.*

159. See Chemerinsky, *Nixing*, *supra* note 36, at 3.

*c. continued acceptance of the unanimity requirement
freezes the law in time*

Finally, supporters of nonunanimous verdicts attack the historical pedigree justification by arguing that the approach effectively freezes the law in time.¹⁶⁰ If we base our acceptance of the twelve person, unanimous jury requirement on the fact that this was the English practice adopted in the American colonies, arguably a host of other practices should be admitted under the same rationale.¹⁶¹ Some of these practices do not fit comfortably within our current scheme of democracy, but the historical argument mandates their inclusion. The court in *State v. Gann* pointed out that "[i]n England, in the colonies, and in many of the states, a jury was required to be composed only of white male property owners."¹⁶² Using the historical pedigree approach, we would be required to provide for juries composed of white, male property owners.¹⁶³ While this is an extreme case, it demonstrates the weakness of this form of constitutional construction.

2. Adoption of the nonunanimous jury requirement would
effectively reduce the number of hung juries in California

One of the primary motivations of the proposed constitutional amendments is to end the increasing number of hung juries that allegedly plagues the criminal justice system in California.¹⁶⁴ Not only do hung juries tax the economic and judicial resources of California,¹⁶⁵ but they potentially threaten the integrity of the criminal justice system in the eyes of the public.¹⁶⁶

160. See *id.*; *Hurtado*, 110 U.S. at 528-29 (rejecting the argument that any proceeding which "has the sanction of settled usage both in England and in [the United States]" necessarily represents due process of law).

161. *Gann*, 463 P.2d at 575.

162. *Id.*

163. *Id.*

164. A.C.A. 18, *supra* note 18, at 2; S.C.A. 24, *supra* note 19, at 3.

165. S.C.A. 24, *supra* note 19, at 3; Bill Ainsworth, *And Then There Were Ten*, *RECORD*, Jan. 10, 1995, at 1 [hereinafter Ainsworth, *Ten*].

166. Calderon, *supra* note 9, at 10A ("Bizarre jury verdicts in recent high-profile cases have shaken the public's confidence in our jury system."); Laura Mecoy, *Drive For Legal Reforms To Follow Simpson Trial*, *SACRAMENTO BEE*, June 4, 1995, at A1; Meyer, *Reformers*, *supra* note 23, at A12 ("One more high-profile trial torpedoed by a holdout juror or two . . . and a 'crisis in credibility' in the judicial system may prompt calls for an overhaul." (quoting L.A. County District Attorney Gil Garcetti)).

California Senator Charles Calderon, in his proposed amendment, cites as one of the bill's goals "increas[ing] the number of convictions and acquittals by decreasing the rate of hung juries."¹⁶⁷ Assembly-member Rainey's bill aims to "reduce court costs and court congestion due to retrials and speed up the trial process."¹⁶⁸

The hung jury rate for California criminal trials presently hovers between ten to fifteen percent of all criminal jury trials.¹⁶⁹ Even more striking are the figures for hung jury rates by county. In 1994 Los Angeles County's hung jury rate was fourteen percent while Alameda County's was fifteen percent and Ventura County's was eight percent.¹⁷⁰

While these figures are troubling in their own right, the argument for abandoning the requirement gains even more credibility when California's numbers are compared to national percentages and, more importantly, to hung jury rates in states which do not provide for a unanimous verdict requirement in criminal trials.

Currently, about 2.5% percent of juries hang each year in federal criminal cases, and about five percent hang in state courts nationwide.¹⁷¹ Accordingly, California's hung jury rate is approximately four times the nationwide federal court percentage, roughly double the nationwide state court percentage.

For the purposes of evaluating the proposed constitutional amendments it is much more helpful to compare California's hung jury rate with the hung jury rates in majority verdict states and to examine studies analyzing primary and final jury ballots in terms of their relationship to final verdicts and hung juries.¹⁷² From this type of inquiry, one can estimate the effectiveness of eliminating the unanimity requirement in reducing hung jury rates.

As noted earlier, only Oregon and Louisiana do not require unanimity.¹⁷³ Oregon has allowed for 10-2 verdicts in all felony criminal cases except first-degree murder since 1934.¹⁷⁴ Like the

167. S.C.A. 24, *supra* note 19, at 3.

168. A.C.A. 18, *supra* note 18, at 3.

169. Riley, *supra* note 34, at A11.

170. Dwayne Bray, *Prosecutors Seek a Change in Jury-Voting System*, L.A. TIMES (Ventura County ed.), June 11, 1995, at B1, B8; see Dolan, *supra* note 2, at A1.

171. *Necessity of Change*, *supra* note 8, at S4.

172. See *infra* notes 179-84 and accompanying text (discussing Kalven & Zeisel study on majority versus unanimous verdicts).

173. For a look at the relevant constitutional provisions from both states, see *supra* note 33.

174. Blum, *supra* note 9, at A1, A24.

current proposed amendments in California, Oregon's rejection of the unanimity requirement was based on the "frequent occurrence" of hung juries resulting from "one or two jurors . . . controlling the verdict or causing a disagreement."¹⁷⁵ The change has apparently worked wonders: From 1993 to 1995, the statewide hung jury rate has been less than one percent.¹⁷⁶

Louisiana has also experienced a positive return from its elimination of the unanimous verdict requirement. Louisiana first authorized nonunanimous juries in 1928.¹⁷⁷ While statewide statistics are not available, one judge estimated that between 1993 and 1995, the hung jury rate in his court was approximately two-and-a-half percent.¹⁷⁸

In perhaps the only extensive study conducted on the frequency of hung juries in states with and without the unanimity requirement (the Chicago study), University of Chicago professors Harry Kalven and Hans Zeisel found that in states requiring unanimity, the average frequency of hung juries was 5.6%, while in states without the requirement, the rate was 3.1%.¹⁷⁹ Based on these findings, "[t]he jurisdictions that allow majority verdicts have . . . 45 percent fewer hung juries than those that require unanimity."¹⁸⁰

In addition to comparing jurisdictions with and without the unanimity requirement, the Chicago study also took a sample of forty-eight cases hung and examined the final vote of the jurors before deliberations ended. In twenty-four percent of the cases, the jury hung on an 11-1 vote for conviction, while in ten percent of cases, the jury hung on a 10-2 count.¹⁸¹ On the other end of the spectrum, in eight percent of the cases, the jury hung 10-2 to acquit.¹⁸² If the

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 461 (1966). The findings were based on extrapolations of numbers from New York City, New Jersey, Los Angeles, and North Dakota in the late 1950s and early 1960s. Blum, *supra* note 9, at A24. In 1963 in New York there were 7 hung juries per 100 trials that went to verdict, while in Los Angeles there were 15 hung juries per 100 trials. *Id.* The numbers, blended with judges' estimates of hung jury rates, produced the 5.6% national average. *Id.*

The Kalven & Zeisel study has been cited on numerous occasions and was even used by the majority in *Apodaca v. Oregon*, where the Court upheld Oregon's nonunanimous verdict rule. 406 U.S. 404, 411 n.5 (1972).

180. KALVEN & ZEISEL, *supra* note 179, at 461.

181. *Id.* at 460.

182. *Id.*

Rainey bill were in place for all forty-eight of these trials, a reduction of hung jury cases would amount to forty-two percent.¹⁸³ The Calderon bill would have achieved a twenty-four percent reduction in hung jury trials.¹⁸⁴

To better understand the significance of the hung jury problem and, simultaneously, to better appreciate the arguments of the nonunanimous verdict supporters, one must explore the causes of hung juries as well as the benefits which may inure from eliminating the unanimity rule. It is one thing to say California has a problem with hung juries and that a constitutional amendment may help solve the problem, but it is quite another to explain why hung juries burden the system and how the unanimity requirement perpetuates this problem. The following sections address these subjects.

a. the hung jury as a product of the unanimity rule

The jury system operates under the assumption that twelve of the defendant's peers will assemble to hear the charges against the defendant and will then deliberate until they reach a decision shared by all.¹⁸⁵ As Jerome Skolnick describes, "we assume that a jury of 12 ordinary citizens, whatever their racial or ethnic backgrounds, will review and assess evidence from a commonality of moral assumptions and social bonds."¹⁸⁶

What opponents of the unanimous verdict requirement contend, however, is that "[p]erfect unanimity is simply not consistent with human nature. Seldom do 12 people hold the same opinion, particularly on grave matters."¹⁸⁷ To make matters worse, these opponents argue, oftentimes the jury will hang because of one or two jurors who, for invalid reasons, refuse to join the majority opinion.¹⁸⁸

183. The Rainey proposal would permit 10-2 jury verdicts. A.C.A. 18, *supra* note 18, at 1.

184. The Calderon proposal would permit 11-1 jury verdicts. S.C.A. 24, *supra* note 19, at 3.

185. Jerome H. Skolnick, *O.J. Trial: The System Against Itself*, NEWSDAY, Aug. 27, 1995, at A37. Jerome Skolnick is a professor of law and police science at the John Jay School of Criminal Justice in New York. *Id.*

186. *Id.*

187. Tanzer, *supra* note 50, at B9.

188. *Id.*; see Alan Hirsch, *The Jury Is Way Out*, WASH. TIMES, Sept. 27, 1995, at A23; Meyer, *Reformers*, *supra* note 23, at A12; Henry Weinstein & Tim Rutten, *Simpson Case Already Is Rewriting the Rule Book*, L.A. TIMES, June 11, 1995, at A1, A34.

California Assemblymember Richard Rainey contends that a constitutional amendment will "stop the effect of a one or two person veto of the jury process, which is often an expression of dislike or bias against the criminal justice system as opposed to a decision on the law or evidence in a given case."¹⁸⁹ A defender of the Oregon system noted that "[t]he beauty of our system is that it [keeps] the one crackpot, the one person that will never see things the way others do, from holding up the entire system."¹⁹⁰ Finally, a Kern County district attorney feels that change is necessary in California because of the so-called flake factor: "Put any 12 Californians in a room and you'll have [at least] one flake."¹⁹¹

Assuming that these lawmakers and critics of the rule are correct, the unanimity requirement plays a direct role in California's hung jury problem. If one or two jurors can define the entire jury, then perhaps the constitution should be amended to compensate for these completely divergent views.

To better understand how the unanimity rule perpetuates hung juries, it may be helpful to examine the potential reasons why juries hang in the first place. Of these alleged reasons, two stand out as particularly frustrating to proponents of a constitutional amendment: First, one or two stubborn jurors may decide to challenge the majority, oftentimes resting their case on inadmissible evidence or misinterpretations of the law;¹⁹² and second, defense attorneys often approach the jury with the intention of hanging it from the beginning.¹⁹³ If juries hang because jurors are not performing their appropriate role or defense attorneys are intentionally manipulating the jury pool in order to get a favorable decision, then the argument for abolishing the unanimity requirement must be addressed.

189. A.C.A. 18, *supra* note 18, at 3.

190. Meyer, *Reformers*, *supra* note 23, at A12.

191. Weinstein & Rutten, *supra* note 188, at A34.

192. Blum, *supra* note 9, at 1; *The O.J. Trial Anomaly*, SACRAMENTO BEE, June 6, 1995, at B6 [hereinafter *Anomaly*].

193. Gonzales, *supra* note 5, at 1A ("Oftentimes, defense attorneys approach these trials seeking to hang cases, not necessarily seeking acquittals." (quoting Gregory Totten, executive director of the California District Attorney's Association)); Tanzer, *supra* note 50, at B9 (stating that "the strategy of many defense lawyers . . . is often not to seek an acquittal, but to hang the jury by choosing at least one juror with the temperament to hold out against the others and to convince this juror to do so").

- i. hung juries result when one or two jurors refuse to join the majority

Whether or not holdout jurors are “crackpots,” “screwballs,” or “flakes” is not really the issue. For whatever reason, jurors sometimes reach results that seem inconsistent with the evidence presented or the rules of law.¹⁹⁴ There are many reasons posited for why jurors reach questionable results. The most basic argument is that human nature contradicts twelve minds agreeing on one issue.¹⁹⁵ No matter how good or bad the case against the defendant is, the assumption that a commonality of views will arise is naive and speculative.¹⁹⁶ The chances of unanimity are even less likely when a highly charged issue of morality is involved.¹⁹⁷ In every murder case jurors confront the possibility of incarcerating a defendant for life or possibly sentencing the defendant to death. Some individuals facing this decision may succumb to sentiment or even a guilty conscience.¹⁹⁸

Instead of adjudicating the defendant’s guilt or innocence on the basis of the facts of the case and the relevant rules of evidence, jurors may decide to use their vote to effect some other purpose.¹⁹⁹ Unanimity opponents point to countless numbers of cases in which jurors confessed afterwards to casting their votes on some inappropriate basis.²⁰⁰ In the trial of a Westlake mother charged with child abuse for allegedly disciplining her daughter by biting her and

194. See Blum, *supra* note 9, at 1; Gonzales, *supra* note 5, at 1A.

195. Tanzer, *supra* note 50, at B9.

196. *Id.*

197. *Id.*

198. See Ainsworth, *Ten*, *supra* note 165, at 1 (“‘What we’re trying to avoid are cases with absolutely compelling evidence where a juror didn’t have the intestinal fortitude to convict.’” (quoting Mike Reynolds, sponsor of the “Three Strikes” law in California)); Kay Daut Alvarez, *Change the Verdict System*, SAN DIEGO UNION-TRIB., July 21, 1994, at 1 (discussing the Menendez jurors’ emotional verdicts).

199. Few will forget Johnny Cochran’s closing argument in the Simpson case imploring the jury to acquit O.J. Simpson and send a message to the Los Angeles Police Department. Jim Newton & Andrea Ford, *Acquit Simpson and Send Police a Message*, *Cochran Urges Jury*, L.A. TIMES, Sept. 28, 1995, at A1. Cochran instructed the jury that its verdict “[would] go far beyond the walls of [the courtroom]” and that the verdict “talks about the police and whether they’re above the law.” *Id.*; see also Alvarez, *supra* note 198, at 1 (arguing that “[i]f California adopted a 10-out-of-12 ruling, we could blunt the effectiveness of recalcitrant individuals who promote their private agendas”).

200. See, e.g., *supra* text accompanying notes 5-7 (discussing the Santa Clara kidnapping case where the lone holdout juror failed to convict based on evidence which was not even admissible).

imprisoning her in a racquetball court, the jury hung 11-1.²⁰¹ The one juror who voted for acquittal told the other jurors that "he empathized with the defendant because he had raised an unruly daughter of his own."²⁰² Arguably, this rationale is not an appropriate basis on which a juror should rest a decision.

Much discussion has surrounded the idea of jury nullification.²⁰³ Although the scope of this Comment does not permit a detailed analysis, it is important to realize that jurors can and sometimes do disregard the law and render opinions based upon their own sense of justice. As the court noted in *United States v. Dougherty*,²⁰⁴ "[t]he pages of history shine on instances of the jury's exercise of its prerogative to disregard . . . [the] instructions of the judge."²⁰⁵ Furthermore, the court noted that "[t]he jury gets its understanding . . . [of] the legal system from more than one voice. There is the formal communication from the judge. There is the informal communication from the total culture . . . and, of course, history and tradition."²⁰⁶

In addition to jurors simply voting their consciences without following the established rules of evidence or substantive law, opponents of unanimity feel that many procedural features of the jury system contribute to questionable results.²⁰⁷ Elimination of the rule, the argument runs, would simply compensate for the occasional juror who, for procedural reasons, arrives at a faulty decision.²⁰⁸

During the course of a trial, most courts forbid jurors to ask questions, take notes, or see transcripts of prior testimony.²⁰⁹ Jurors are the factfinders in a legal proceeding. Procedural rules which prevent them from assimilating an adequate picture of the facts serve

201. Bray, *supra* note 170, at B1.

202. *Id.*

203. Jury nullification is a practice in which jurors choose to disregard a written rule of law because they do not agree that the law comports with traditional notions of justice. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *see also* Franklin Strier, *Justice by Jury Is a Myth*, L.A. TIMES, July 18, 1994, at B7 (stating that "the power of jurors to ignore the law is inviolable, defended by pillars of the bench and bar alike").

204. 473 F.2d 1113 (D.C. Cir. 1972).

205. *Id.* at 1130.

206. *Id.* at 1135.

207. *See* Josh Meyer, *Small Vanguard Presses Its Case for Jury Reforms*, L.A. TIMES, Sept. 28, 1994, at A1, A12 [hereinafter Meyer, *Vanguard*]; Strier, *supra* note 203, at B7.

208. A.C.A. 18, *supra* note 18, at 3.

209. Strier, *supra* note 203, at B7.

to cripple the process.²¹⁰ Decisions should be informed, and rules which handicap the jury may potentially cause one or two individual jurors to reach a questionable result.²¹¹

Arcane judicial instructions that many jurors cannot understand or apply are another procedural handicap threatening the results of jury trials.²¹² Confusing legalese, convoluted sentence structure, and indefinite standards combine to potentially confuse the jury and confound the results.²¹³ Assuming that some jurors do not comprehend instructions, decisions that hang by one or two votes may be the product of the confusing rules rather than a sign that the defendant's guilt or innocence was clear.²¹⁴

Clearly, the jury system does not always perform as intended and these are exactly the cases that proponents of the proposed constitutional amendments are trying to combat.²¹⁵ As will be discussed later, however, this phenomenon may not pose as much of a problem as critics of the jury system think.

ii. hung juries as a result of defense counsel tactics

Defense attorneys who exercise an array of clever tactics to manipulate jurors and influence their decision-making process provide another source of questionable jury results.²¹⁶ Some lawyers are skilled at playing upon the emotions of the lay juror.²¹⁷ Appeals to sympathy, victim-blaming, and moral posturing are all defense

210. *Id.*; Hirsch, *supra* note 188, at A23.

211. Meyer, *Vanguard*, *supra* note 207, at A12.

212. Dolan, *supra* note 2, at A1 ("Jurors have trouble understanding judges who give convoluted instructions."); Strier, *supra* note 203, at B7 ("[T]he judge's instructions usually confound the jurors with jargon-laden, incomprehensible language—worded to avoid appellate reversal, not to guide jurors.").

For a general discussion of the problems surrounding jurors' comprehension of the law and application of judicial instructions, see Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869 (1995).

213. See *Pressure Grows to Reform Juries*, ARIZ. REPUBLIC, May 14, 1995, at A2; Strier, *supra* note 203, at B7.

214. Meyer, *Vanguard*, *supra* note 207, at A12 ("[S]tudies and some experts argue, an alarming number of jurors do not comprehend the stupefying amount of evidence and the convoluted jury instructions thrown at them in many complex trials. Sometimes they come down on the wrong side of the law.").

215. A.C.A. 18, *supra* note 18, at 3; S.C.A. 24, *supra* note 19, at 3.

216. Strier, *supra* note 203, at B7 ("For years, crafty attorneys have prevailed . . . by plying myriad forensic tricks and pandering to the basest of juror emotions.").

217. *Id.*

attorney tools.²¹⁸ Lawyers may also focus on societal stereotypes steeped in racism,²¹⁹ sexism,²²⁰ and homophobia.²²¹

The most disturbing defense attorney practice is intentionally attempting to hang the jury from the start. According to Ron Janes, Ventura chief deputy district attorney, "[i]t's no secret the defense attorneys, in their training, are taught to hang up juries."²²² Gregory Totten, executive director of the California District Attorney's Association, feels that "oftentimes, defense attorneys approach trials seeking to hang cases, not necessarily seeking acquittals."²²³

Defense counsel manipulation arguably begins during voir dire with some lawyers searching for one or two partial jurors most likely to hang the jury.²²⁴ After impaneling the jury, defense lawyers begin the process of manipulation and pandering, focusing attention on those jurors who appear vulnerable and perhaps predisposed toward the defendant.²²⁵ Charles Calderon, author of S.C.A. 24, claims that the problem with jury trials is "the emergence of designer defenses which often attempt to rationalize murder and mayhem through psychological quackery."²²⁶

Another tactic defense lawyers utilize is shifting the jury's attention away from the crime, trying instead to put some other person or institution on trial.²²⁷ While in some cases it is necessary

218. Bray, *supra* note 170, at B8.

219. The questions that linger post-Simpson concern the role race played in the outcome and whether Johnny Cochran intentionally "played the race card" in order to influence an African-American majority jury.

220. One can imagine a rape trial where defense counsel attempts to put the victim's promiscuity into question. How was the victim dressed? Didn't the victim's actions incite the defendant's conduct?

221. Juries are not immune to prejudices against homosexuals. In one case two men had been accused of committing a sex act in a bathroom. The majority of the jury wanted to acquit "but one woman refused to budge, making derogatory comments about gays." Dolan, *supra* note 2, at A1, A23. The jury ultimately hung. *Id.*

222. Bray, *supra* note 170, at B8. Whether the legal profession condones these practices is the source of debate; commentators note that some law school courses and practitioners seminars instruct defense attorneys in the use of these manipulative tactics. Strier, *supra* note 203, at B7.

223. Gonzales, *supra* note 5, at 1A.

224. Linda Walters, *Overturn System of Unanimous Jury*, L.A. TIMES (Orange County ed.), June 22, 1995, at B11 (stating that "the defense rarely tries to select 12 impartial, reasonable people. Rather, they search for the one or two unreasonable or biased individuals to obstruct a unanimous verdict.").

225. *Id.*

226. Calderon, *supra* note 9, at 10A.

227. Dolan, *supra* note 2, at A22. It has been argued that the Simpson trial turned, perhaps unrightfully, into a trial of the Los Angeles Police Department. Jeff Brazil &

for the defense attorney to explore other avenues of inquiry, the practice of intentionally clouding the issues to confuse lay jurors is unconscionable. Many cases are difficult to begin with and complex evidence, confusing substantive rules, and expert testimony make the juror's job even more difficult.²²⁸ Defense attorneys are required to expose holes in the prima facie case but, often, the practice creates holes where none existed.

b. reducing the hung jury rate in California will result in a reduction in economic and judicial costs

In some jurisdictions, the costs of retrial approach \$10,000 a day, and depending on the case, the total costs can be astronomical.²²⁹ These costs are exactly what the authors of the proposed constitutional amendments are targeting. A.C.A. 18 lists as one of its potential effects "[the reduction of] court costs and court congestion due to retrials."²³⁰ S.C.A. 24 notes that "[o]ne of the stated purposes behind this bill is to cut court costs by cutting out retrial of cases that return a 11/12 verdict."²³¹

As discussed previously, there is reason to believe that the unanimity requirement influences hung jury rates and may even increase them.²³² Since hung juries result in costly retrials, logic suggests that the unanimity requirement is also responsible for increased economic and judicial costs.²³³ Therefore, elimination of the unanimity requirement will decrease hung jury rates, ultimately reducing court costs and freeing judicial resources.²³⁴

James Rainey, *LAPD Was on Trial, Say Angry Officers*, L.A. TIMES, Oct. 4, 1995, at A8.

228. Meyer, *Vanguard*, *supra* note 207, at A12; Strier, *supra* note 203, at B7.

229. Bray, *supra* note 170, at B8. For example, a defendant in an Orange County homicide case is currently awaiting his third trial after the first two juries hung. Walters, *supra* note 224, at B11. The cost thus far is approximately \$1.4 million. *Id.*

230. A.C.A. 18, *supra* note 18, at 2.

231. S.C.A. 24, *supra* note 19, at 4.

232. REID HASTIE ET AL., *INSIDE THE JURY* 32 (1983). Reid Hastie is a professor in the Department of Psychology at the University of Colorado.

233. Bill Billiter, *Council Endorses Idea of 11-1 Jury Verdicts*, L.A. TIMES (Orange County ed.), July 1, 1995, at B3. California senator Charles Calderon, who put forth this argument, believes that "the criminal justice system has been plagued by an unnecessarily high rate of hung juries, which has crippled our prosecutorial abilities and substantially decreased local revenues because of the high cost of longer jury sequestration and retrials." *Id.*

234. *Id.* at B3; *Unanimous Juries Work—Let's Not Change the Rule*, L.A. TIMES, Sept. 26, 1995, at B8 [hereinafter *Unanimous Juries Work*].

In addition to the savings resulting from reduced hung jury rates, supporters of the nonunanimous verdict contend that eliminating the unanimity rule will reduce the number of first trials,²³⁵ further streamlining economic and judicial costs.²³⁶ The rationale behind this argument is that some defendants and their attorneys demand jury trials even though they are aware that the evidence against them is sufficient to convict.²³⁷ Such defendants hope they will be fortunate enough to get one juror who will hang the entire panel.²³⁸ A defendant who is clearly guilty might gamble on a trial rather than plea bargain with the prosecutor.²³⁹

Supporters of the proposed constitutional amendment are also looking toward the future impact of California's "Three Strikes" law,²⁴⁰ which is likely to increase jury trials.²⁴¹ Due to the harsh sentences imposed by the new initiative, "defendants will have less incentive to strike plea bargains and more incentive to go to a jury trial."²⁴² If the unanimity requirement results in more hung juries, the number will increase in proportion to the rise in jury trials due to the Three Strikes law.²⁴³ The net effect: an increase in costly, time-consuming retrials.²⁴⁴

3. Critics of nonunanimous verdicts assume that jurors do not air and weigh all issues when a majority verdict is permitted

One of the fundamental justifications of the unanimity requirement is that it forces jurors to critically consider the issues and spend time deliberating with each other.²⁴⁵ The absence of a unanimous

235. S.C.A. 24, *supra* note 19, at 8; *see also* Ainsworth, *Measure Blocked*, *supra* note 21, at 4 (noting that prosecutors contend that a 10-2 system would persuade defense attorneys to plead their clients guilty as opposed to risking a trial).

236. Ainsworth, *Measure Blocked*, *supra* note 21, at 4.

237. Bray, *supra* note 170, at B8.

238. *Id.*

239. *Id.*

240. CAL. PENAL CODE § 1170.12 (West Supp. 1996). The initiative doubles the sentence for anyone convicted of a second serious or violent felony, including burglary, and mandates a 25-year-to-life sentence for a third felony.

241. Ainsworth, *Ten*, *supra* note 165, at 6; Holding, *supra* note 24, at 1. For a general discussion of the "Three Strikes" law, *see* Victor S. Sze, Comment, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047 (1994).

242. Ainsworth, *Ten*, *supra* note 165, at 6.

243. *See id.*

244. *See id.*

245. *Unanimous Juries Work*, *supra* note 234, at B8 ("Requiring unanimity is the best

verdict presumably indicates that the jury has not deliberated effectively and that the resulting verdict is in some way flawed.²⁴⁶ This argument is often tied up in the “reasonable doubt standard.”²⁴⁷

The issue is whether the majority will hear the minority voices on a 10-2 or 11-1 verdict and whether a verdict rendered by less than all of the panel members gives substance to the reasonable doubt standard.²⁴⁸ The Supreme Court has addressed both of these concerns. In *Johnson v. Louisiana*²⁴⁹ the Court decided that “want of unanimity does not alone establish reasonable doubt.”²⁵⁰ Just because one or two jurors do not side with the majority is no reason to “denigrat[e] the vote of so large a majority or . . . refuse to accept their decision as being, at least in their minds, beyond a reasonable doubt.”²⁵¹ For this very reason judges facing a hung jury will issue the infamous “dynamite”²⁵² charge which states:

[I]f much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.²⁵³

way to ensure that all jurors listen carefully to the evidence as it is given during the trial and to one another during deliberations.”).

246. Fein, *supra* note 36, at B9; Gonzales, *supra* note 5, at 1A.

247. See *infra* notes 248-54 and accompanying text. In all criminal cases the standard for conviction, as provided by the 14th Amendment, is guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

248. The defendants in both *Apodaca* and *Johnson* argued that in order to give substance to the reasonable doubt standard provided by the Due Process Clause, the clause must be construed to require a unanimous verdict in criminal trials. See *Unanimous Juries Work*, *supra* note 234, at B8 (stating that “[a]llowing the majority of jurors to disregard the views of a minority could . . . undermine the historical obligation to prove guilt beyond a reasonable doubt”).

249. 406 U.S. 356 (1972).

250. *Id.* at 363.

251. *Id.* at 361.

252. Dolan, *supra* note 2, at A23.

253. *Allen v. United States*, 164 U.S. 492, 501 (1896).

The Supreme Court has consistently held that a verdict reached by ten or eleven of twelve jurors satisfies the reasonable doubt standard and represents a fair and constitutional adjudication.²⁵⁴

The Court has also addressed the concern that permitting majority verdicts allows the majority to ignore the minority voice.²⁵⁵ In *Apodaca v. Oregon* the Court stated that

[w]e cannot assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds . . . or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal.²⁵⁶

Since the minority voices are present during the deliberation process, they are heard and more than likely are taken into account.²⁵⁷

4. The unanimity requirement engenders compromise convictions

When only ten or eleven jurors agree on acquittal or conviction, the jury finds itself in a difficult position.²⁵⁸ Because one or two jurors will not agree with the majority vote, the entire panel may fail to reach any sort of decision.²⁵⁹ If the defendant faces charges of murder or some other serious offense, the majority confronts the possibility that because the minority juror will not side with them, the defendant, who appears to be guilty and potentially poses a threat to society, may go free.²⁶⁰ On the other hand, if the defendant appears to be entirely innocent, one or two stubborn jurors may prevent that defendant from going free.²⁶¹

True, a hung jury may result in a retrial, but the jury, who has heard the case and strongly believes that the defendant is guilty, may not want to risk a future acquittal. One option is to attempt to reach a compromise with the minority jurors.²⁶² For example, a jury might convict for manslaughter rather than first degree murder.²⁶³ Such

254. *Johnson*, 406 U.S. at 362-63; *Apodaca*, 406 U.S. at 411.

255. *Apodaca*, 406 U.S. at 412-14.

256. *Id.* at 413.

257. *Id.*

258. *See Dolan*, *supra* note 2, at A1.

259. *Id.* at A23.

260. *Id.*

261. *Id.*

262. ABRAMSON, *supra* note 38, at 203-04.

263. *Id.* at 203 (noting that in the first Menendez trials, some jurors revealed that "they

bargaining, however, fosters the feeling that justice was not served.²⁶⁴ The probably guilty defendant received a lesser punishment, not because the conduct was less culpable, but because of the state's stubborn adherence to the unanimity requirement.

Any decision resulting from compromise rather than careful and intelligent deliberation of the facts based on the applicable laws is inherently suspect. Unfortunately, the requirement that juries reach a unanimous verdict may lead "not to full agreement among the 12 but to agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise."²⁶⁵

B. Arguments in Favor of the Unanimity Requirement

Taken together, the justifications for eliminating the unanimity requirement are persuasive. The basic argument is that California's obvious problem with hung juries is taking an excessive financial toll.²⁶⁶ A major cause of the problem is the constitutional requirement of unanimous verdicts in criminal trials. The solution is to simply amend the state constitution.²⁶⁷ Such an amendment would not violate federal Due Process, as the Supreme Court has condoned majority verdicts in state criminal trials.²⁶⁸

Despite the appeal of this argument, California should continue its adherence to the unanimity requirement. While the critics are correct that mere historical acceptance of the rule does not provide enough justification for continued adherence, that California has provided for a unanimous verdict requirement since its passage into statehood lends some credibility to the requirement.²⁶⁹

Similarly, the fact that only two states have abandoned the requirement offers further validation of the requirement's soundness.²⁷⁰ If the rule is responsible for hung juries and excessive financial costs, then why have only two states amended their

had considered a compromise verdict between those voting manslaughter and those favoring murder conviction").

264. Dolan, *supra* note 2, at A1.

265. *Johnson*, 406 U.S. at 377 (1972) (Powell, J., concurring).

266. *See supra* part IV.A.2.b.

267. A.C.A. 18, *supra* note 18, at 1-2; S.C.A. 24, *supra* note 19, at 3.

268. *See supra* part II.B.

269. *See supra* part III.A. (discussing the history of the unanimity requirement in California).

270. In the United States only Oregon and Louisiana provide for less than unanimous verdicts. *See supra* note 33.

constitutions to provide for majority verdicts? Furthermore, why has the majority of the United States regarded the unanimity requirement as a fundamental feature of a trial by jury for over 400 years?²⁷¹

1. The unanimity requirement is a defendant's necessary protection against the state

When a proposed constitutional amendment is on the table, it is necessary to ask whether the change can occur without frustrating the purpose of the system being altered. In this particular case can the jury system achieve its purpose without the unanimity requirement?

The Court has stated that one of the fundamental reasons for having the jury system is to provide the defendant with a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."²⁷² One of the essential features of the jury system is that it represents "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."²⁷³

Elimination of the unanimity requirement frustrates this purpose in a number of ways. The proposed amendment eases the prosecutorial burden in a criminal trial.²⁷⁴ Rather than having to convince all twelve jurors of the defendant's guilt, the prosecutor can be victorious despite the continued doubt of one or two jurors. While proponents of constitutional change argue that invalid motivations often guide minority jurors,²⁷⁵ evidence suggests that at times, minority jurors actually have a valid point.²⁷⁶

A study conducted by the Los Angeles Public Defender's Office from July 1, 1994 to June 7, 1995 found that of thirty-two trials which hung for the first time by an 11-1 count in favor of guilt, four were dismissed and twelve were retried.²⁷⁷ Of those twelve, five were found to be not guilty and one more was subsequently dismissed.²⁷⁸

271. S.C.A. 24, *supra* note 19, at 3.

272. *Duncan v. Louisiana*, 391 U.S. 145, 156, *reh'g denied*, 392 U.S. 947 (1968).

273. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

274. *Bray*, *supra* note 170, at B8 ("Defense attorneys . . . say non-unanimous verdicts would simply result in more juries rubber-stamping prosecutors' cases.").

275. *See supra* part IV.A.2.a.i.

276. *See Chemerinsky, Nixing*, *supra* note 36, at 3; *Fein, supra* note 36, at B9.

277. S.C.A. 24, *supra* note 19, at 5.

278. *Id.*

If either of the proposed constitutional amendments had been in effect, these ten defendants would have been convicted²⁷⁹ and deprived of their liberty. These cases demonstrate that the one juror who voted to acquit was not such an anomaly after all, since either the prosecutor or twelve jurors subsequently agreed with the lone dissenter in the first trial. Perhaps the eleven members of the first trial who voted to convict were in error.

Is any change which threatens to put innocent people in jail worth the projected benefits? Arguably, it is better to have a hundred juries hang than to wrongfully convict one innocent citizen.²⁸⁰ The more we erode the protections of the defendant the more likely it is that innocent citizens face convictions for crimes they did not commit.²⁸¹ Elimination of the unanimity requirement clearly frustrates one of the purposes of the jury system—protection of the defendant from tyranny by the state.²⁸² For this reason alone, Californians should question the wisdom of the proposed constitutional amendments.

2. The hung jury is not necessarily a negative creature

Authors and supporters of the proposed amendments cast the hung jury in negative terms, deeming it an evil must be eradicated.²⁸³ For these critics, the hung jury represents a breakdown of the jury system. The criminal justice system failed to convict the guilty or acquit the innocent and the net result is a waste of economic and judicial resources.

The idea that a hung jury automatically represents a failure of the system, though, is misleading.²⁸⁴ If after hearing the case and conscientiously deliberating among themselves a jury cannot unanimously agree on a verdict, perhaps the case was just not persuasive.²⁸⁵ The prosecutor failed to carry the burden of proof even if the jury was not completely convinced that the defendant was blameless. In this light, a hung jury represents a victory on the part

279. *Id.*

280. Chemerinsky, *Nixing*, *supra* note 36, at 3.

281. *See id.*; *Unanimous Juries Work*, *supra* note 234, at B8.

282. *Williams*, 399 U.S. at 100; *Duncan*, 391 U.S. at 155-56.

283. *See HASTIE ET AL.*, *supra* note 232, at 165-66.

284. *Id.*

285. *See Blum*, *supra* note 9, at A25; *Meyers, Reformers*, *supra* note 23, at A12; *Unanimous Juries Work*, *supra* note 234, at B8.

of the jury system.²⁸⁶ Rather than reach a compromise decision or simply yield to the majority opinion, the members of a hung jury had the courage to disagree with each other.

That a hung jury represents a victory for the jury system was best stated in *Huffman v. United States*:²⁸⁷

It is simply not legally correct that some jury must sometime decide that the defendant is "guilty" or "not guilty." The fact is, as history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful, vital function in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured.²⁸⁸

3. Elimination of the unanimity requirement will not substantially alter hung jury rates or conviction rates

The most frequently advanced justification for the proposed constitutional amendment is that California has a serious problem with hung juries and something must be done immediately to solve it.²⁸⁹ While this argument is tempting, two major assumptions made by proponents of the proposed amendments lack evidentiary support and appear to be driven by faulty perceptions. First, proponents estimate that the hung jury rate is a problem of massive proportion²⁹⁰ and second, they rationalize that the proposed constitutional amendment will substantially affect hung jury and conviction rates.²⁹¹ Both of these assumptions demand scrutiny because available evidence suggests that both are invalid.

286. HASTIE ET AL., *supra* note 232, at 165-66. Professor Hastie notes that the hung jury can be viewed as "a valued assurance of integrity" and signals that "antidefendant bias was not present." *Id.*

287. 297 F.2d 754 (5th Cir. 1962).

288. *Id.* at 759.

289. A.C.A. 18, *supra* note 18, at 2; S.C.A. 24, *supra* note 19, at 3.

290. A.C.A. 18, *supra* note 18, at 3.

291. See *id.*; S.C.A. 24, *supra* note 19, at 3; Boyarsky, *Balky Trial*, *supra* note 143, at A18.

*a. the hung jury rate in California is really not
as problematic as critics argue*

While the hung jury rate in California is approximately ten percent of all criminal jury trials,²⁹² "this is a very small percentage of the criminal caseload. The overwhelming majority of criminal cases—about 95%—never go to trial, but are dismissed or disposed of by plea bargain."²⁹³ A survey conducted by the Los Angeles Public Defender's Office (Public Defender Survey) from July 1, 1994 to June 7, 1995 found that hung juries constitute less than one percent of all cases disposed of by the justice system each year.²⁹⁴

Turning to the alleged cost reductions which would result from elimination of the hung jury requirement, the Public Defender survey found that of thirty-two juries that hung for the first time from July 1, 1994 to June 7, 1995, only twelve resulted in retrial. The possible cost savings had the proposed amendment been in place would only amount to twelve retrials.²⁹⁵

These figures beg the question of whether a constitutional amendment is really necessary. Assuming that the hung jury is not necessarily a negative entity, it would not be wise to tinker with a provision which has been in place for over 145 years solely to save the cost of twelve trials and deal with a problem that characterizes less than one percent of all criminal cases disposed of by the justice system each year.

*b. the proposed constitutional amendment will not effect the change
that proponents claim it will*

Authors and proponents of the proposed amendments believe that permitting convictions or acquittals on a 10-2 or 11-1 vote will somehow reduce the hung jury rate and restore the public's confidence in the criminal justice system.²⁹⁶ This belief, however, rests on the assumption that juries usually hang by one or two jurors.

292. Boyarsky, *On Trial*, *supra* note 148, at A17.

293. *Id.*

294. S.C.A. 24, *supra* note 19, at 5. In 1993-1994 the Los Angeles Public Defender's Office handled a total of 307,241 misdemeanor and misdemeanor traffic cases. *Id.* Hung juries accounted for only 0.3% of the total cases handled by the office. *Id.*

295. S.C.A. 24, *supra* note 19, at 5.

296. *Id.*

Contrary to this assumption, however, evidence suggests that most hung juries are more evenly divided.²⁹⁷ The Public Defender Survey found that most hung juries were divided 6-6, 7-5, 8-4, or 9-3, and only a fraction of those cases resulted in convictions on retrial.²⁹⁸ If it is true that most hung juries are hung 6-6, 7-5, 8-4, or 9-3, then a constitutional amendment allowing convictions or acquittals by a 10-2 or 11-1 vote will not accomplish those goals that it was designed to accomplish.

Interestingly enough, the Chicago study²⁹⁹ relied upon by the Supreme Court and by proponents of the constitutional amendments also provides evidence that eliminating the unanimity requirement will not achieve the proponents' goals. Studying the development of the voting situation from the first to the final ballot, the authors found that "juries which begin with an overwhelming majority in either direction are not likely to hang."³⁰⁰ One conclusion that can be drawn from this finding is that juries starting out with an 11-1, 10-2, 1-11, or 2-10 vote will usually end up convicting or acquitting. A constitutional amendment will not really affect those cases which appear to be clearcut to most of the jurors from the beginning.

Juries beginning with a minority of four or five jurors after the first vote have an increased tendency to deadlock. The authors of the study suggest, however, that "[i]f one take[s] the first ballot vote as a measure of the ambiguity of the case, then it follows that the case itself must be the primary cause of a hung jury."³⁰¹ This conclusion suggests that in many cases, it is not the one or two eccentric or irrational jurors who hang the case; rather, the case itself raises reasonable doubt.³⁰² Perhaps the prosecutor did not present the case well or there was not a viable case from the start. In either event, an amendment to the California Constitution will not further the goals of criminal justice. In a few cases it might erase the impact of an occasional eccentric juror but overall, eliminating the unanimity requirement is not the answer to the hung jury problem.

297. Kim Taylor-Thompson, *Majority Rule on Juries Would Increase Errors*, S.F. CHRON., June 5, 1995, at A19; *Unanimous Juries Work*, *supra* note 234, at B8.

298. *Unanimous Juries Work*, *supra* note 234, at B8.

299. See *supra* notes 179-84 and accompanying text.

300. KALVEN & ZEISEL, *supra* note 179, at 462.

301. *Id.* at 462-63.

302. Blum, *supra* note 9, at A25; *Unanimous Juries Work*, *supra* note 234, at B8.

4. Deliberation suffers when nonunanimous verdicts are permitted

The unanimity requirement forces jurors, minority and majority alike, to listen to each other and try to reach a consensus vote.³⁰³ This process of deliberation is one of the hallmarks of the jury system, and a constitutional amendment which allows jurors to reach a majority verdict directly threatens the deliberation process.³⁰⁴ The problem with allowing majority verdicts is that once the requisite number of votes are obtained, the incentive to listen to the minority's voices vanishes.³⁰⁵ For all practical purposes, once the requisite number are in agreement, the jury's job is done.

In an extensive study of jury decisionmaking, Reid Hastie determined that allowing for majority verdicts negatively impacts the deliberation process.³⁰⁶ First, Hastie found that jurors spent less time deliberating when majority verdicts were allowed.³⁰⁷ Once the jury found that a majority had been obtained, deliberation stopped shortly thereafter.³⁰⁸ Second, "[n]onunanimous juries discuss both evidence and law during deliberation far less thoroughly than do unanimous rule juries."³⁰⁹ Third, overall satisfaction with deliberation was higher among unanimous rule juries than majority rule juries.³¹⁰ Finally, "minority faction members participate with greater

303. ABRAMSON, *supra* note 38, at 205; Chemerinsky, *Nixing*, *supra* note 36, at 3; Taylor-Thompson, *supra* note 297, at A19.

304. ABRAMSON, *supra* note 38, at 205; Chemerinsky, *Nixing*, *supra* note 36, at 3.

305. See ABRAMSON, *supra* note 38, at 199-200; Chemerinsky, *Nixing*, *supra* note 36, at 3; Taylor-Thompson, *supra* note 297, at A19; Steve Wilson, *Hung Juries Preferable to Those that Make Wrong Decision*, ARIZ. REPUBLIC, Sept. 27, 1995, at A2.

Even England, which abolished the unanimity requirement in 1967, appears to be aware of the potential problems associated with majority verdicts. In the English statute allowing for majority verdicts, a court may not accept a verdict unless

it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

Juries Act, 1974, ch. 23, § 17 (Eng.). This section may reflect a concern that jurors will not deliberate long enough if permitted to return a less than unanimous verdict.

306. HASTIE ET AL., *supra* note 232, at 227-29.

307. *Id.* at 32.

308. *Id.*

309. *Id.* at 228.

310. *Id.* at 32.

frequency and are perceived as more influential in unanimous as compared to majority rule juries.³¹¹

Hastie's study suggests that requiring unanimity enhances the deliberation process.³¹² Jurors take more time to reach a decision and appear to do a more thorough job.³¹³ Members of the minority factions within the jury play a more active and effective role in the deliberation process and they feel satisfied that their voices were heard.³¹⁴

Thwarting the jury's deliberation may affect the defendant's chances at a fair trial as well. It is important to note that in one of every ten cases, the minority opinion successfully wins the majority members over to its viewpoint.³¹⁵ If majority verdicts are permissible, the wisdom and insight driving the minority viewpoint may not be heard.³¹⁶

5. Nonunanimous verdicts may also be the result of jury compromising

While opponents of the unanimity requirement assert that the rule engenders compromise on the part of jurors intent on "getting it over with," nonunanimous jury verdicts may also result from compromise. A jury hung 9-3, 8-4, 7-5, or 6-6 on a murder case tempts the majority to suggest a reduction to manslaughter to convince two or three minority jurors to abandon their position in order to satisfy the majority verdict requirement. The argument that the unanimity requirement must be abolished to prevent compromised verdicts is invalid since compromise potentially marks all trials to some degree, whether unanimity is required or not.

311. *Id.*

312. *Id.* at 227-30.

313. *Id.* at 228.

314. *Id.* at 32.

315. Fein, *supra* note 36, at B9. This type of scenario is reminiscent of the classic Hollywood movie, *12 Angry Men*, where one courageous juror stood up to his 11 fellow panelists and convinced them that the defendant was innocent. *12 ANGRY MEN* (United Artists 1957).

316. HASTIE ET AL., *supra* note 232, at 29 ("[I]n majority rule juries . . . minority faction members were especially likely to believe that they had not had opportunity to express all their arguments concerning the case.").

6. Nonunanimous verdicts threaten the credibility
of the criminal justice system

To a certain extent, our confidence in the justice system is rooted in the presumption of innocence.³¹⁷ It is based on the belief that “the government won’t abuse its power and wrongly convict people who aren’t guilty.”³¹⁸ To maintain confidence in the system, the public must believe that the burden of proof is more than a simple formality easily overcome by the state. Allowing nonunanimous verdicts makes the prosecutor’s job easier and a conviction no longer seems to be pure justice. The nonunanimous conviction represents a compromising of the defendant’s presumed innocence.³¹⁹

A constitutional amendment that eliminates the unanimity requirement threatens to denigrate the jury system in the eyes of the public. Unanimous jury verdicts enhance the credibility of the jury system because they appear to represent the rational and reasoned judgment of all twelve jurors.³²⁰ When all of the panelists agree to convict or acquit the defendant, the public feels that the jurors fully deliberated the case and that the resulting verdict is just.³²¹

The absence of unanimity, however, may not engender the same confidence in the results. The public wonders whether the defendant has been proven guilty “beyond a reasonable doubt” if one or two jurors were not convinced.³²² Although the Supreme Court has ruled that the absence of unanimity is not by itself enough to constitute reasonable doubt,³²³ the idea that twelve jurors, deemed impartial by both sides, cannot unanimously agree throws the prosecutor’s case into doubt. Will the public embrace a system in which the prosecutor can put a defendant in jail for years despite the continued doubts of one or two jurors?

317. Wilson, *supra* note 303, at A2.

318. *Id.*

319. See *Johnson v. Louisiana*, 406 U.S. 356, 392-93 (1972) (Douglas, J., dissenting); Ainsworth, *Ten*, *supra* note 165, at 1 (“[Law enforcement groups] will not stop until the system is totally rigged against the defendant, . . . [t]hey are not interested in the notion that a defendant is presumed innocent.” (quoting Jeff Brown, San Francisco public defender)).

320. See Taylor-Thompson, *supra* note 297, at A19.

321. ABRAMSON, *supra* note 38, at 203.

322. *Unanimous Juries Work*, *supra* note 234, at B8.

323. *Johnson*, 406 U.S. at 363-64 (1972).

7. Constitutional change should not result from high-publicity trials

The current push for a constitutional amendment has gained much of its momentum from the recent spate of high-publicity trials with results that leave the public wondering whether justice was served. The first Menendez trials ended in hung juries even though the brothers confessed to killing their parents.³²⁴ The two officers who beat Rodney King were initially acquitted despite recorded footage of the brutal beating.³²⁵ And now, O.J. Simpson has been acquitted despite evidence pointing to his guilt.³²⁶

In many of these trials, the public has had a front row seat in the courtroom, and the never-ending commentary by attorneys and newscasters alike has turned ordinary laypersons into armchair attorneys. More important to the unanimity debate, the public has been assaulted with a series of one-sided criticisms of the jury system, complete with recipes for reform. If the people are called upon to vote for the constitutional amendment, there is a very real possibility that many of them will vote to amend California's Constitution to allow nonunanimous verdicts. Frustration is high and proponents of the proposed amendment are using this public distrust to fuel their campaign.³²⁷

Despite the questionable results in these high-profile trials, the jury system is still a viable institution which serves a vital function. In most cases, jurors fulfill their civic responsibility and render just results based upon the applicable law and fact. Just as Governor Wilson's ten percent hung jury figure can be used to indict the system, it can also be used to demonstrate its effectiveness. After all, if ten percent of California criminal jury trials hang, ninety percent end in unanimous verdicts.

324. *Unanimous Juries Work*, *supra* note 234, at B8.

325. Dolan, *supra* note 2, at A22.

326. Newton, *Not Guilty*, *supra* note 12, at A1, A8. This case has spawned some heated rhetoric. Five months before the verdict was returned, District Attorney Gil Garcetti told the *L.A. Times*, "[People] want a certain level of competence and security, that we are convicting those who should be held accountable. But is the reasonable doubt standard and definition consistent with that desire?" Boyarsky, *Shake-Up*, *supra* note 13, at B4. When asked whether we should change the standard, Garcetti said, "Yes." *Id.*

327. Calderon, *supra* note 9, at 10A; Holding, *supra* note 24, at 10; Tanzer, *supra* note 50, at B9.

The trials of defendants such as the Menendez brothers and O.J. Simpson are not representative of the manner in which the criminal justice system disposes of cases.³²⁸ These cases are unique in almost every respect, including the amount of media coverage they have received and the amount of money that defendants have spent to prepare their defenses.³²⁹ Since these cases are in large part “anomalous,” the question is whether they should be the vehicles for driving reform. Supporters of the unanimity requirement and this Author feel that they are not appropriate springboards for change, especially constitutional amendment.

a. media saturation of high publicity trials gives the public a distorted picture of the manner in which justice operates

Not every criminal defendant can afford to hire a “dream team”³³⁰ and not every criminal trial becomes the center of public fascination. High-profile trials are special in that the public becomes involved in every facet of the case, from the trial proceedings to the personal lives of the attorneys.³³¹ Due to the advent of cameras in the courtroom, the public can watch the entire proceeding, including color commentary by television anchors and live interviews with attorneys before and after each day’s events.³³²

With increased public interest in the actual proceedings comes increased access to evidence which is clearly inadmissible in the legal proceedings. Media sources often exercise poor judgement and poor taste when presenting information concerning trials.³³³ What critics

328. *Fred Goldman*, *supra* note 26, at B1 (“The Simpson trial was in no way typical of how the criminal justice system operates on a daily basis.” (quoting Cristina Arguedas, president-elect of the defense attorneys’ group)); *Necessity of Change*, *supra* note 8, at S7 (“What is particularly troubling is that such proposals are triggered by a trial that is a complete aberration from how our system usually functions.” (quoting Peter Arenella, UCLA law professor)).

329. Erwin Chemerinsky, *A Celebrity Case Is the Wrong Inspiration for Reform*, L.A. TIMES, Aug. 18, 1995, at B9 [hereinafter Chemerinsky, *Wrong Inspiration*]; Weinstein & Rutten, *supra* note 188, at A34.

330. This was the nickname given to the defense team assembled by O.J. Simpson in his murder trial. See Steven Nissen, *Should Congress Pull the Plug on the Legal Services Corp?*, L.A. TIMES, Nov. 29, 1995, at B9.

331. See David Shaw, *Did the Media Overfeed a Starving Public?*, L.A. TIMES, Oct. 9, 1995, at S11; Henry Weinstein, *Experts See Legal Problems in a Media Ban*, L.A. TIMES, Sept. 24, 1995, at A3 (noting that “[t]here are now cameras in courtrooms in virtually every state, including California”).

332. Shaw, *supra* note 331, at S11.

333. Chemerinsky, *Wrong Inspiration*, *supra* note 329, at B9.

of the jury system fail to point out to the public is that jurors do not get to read the papers or the tabloids, and they are not privy to potentially damaging evidence.³³⁴

When we consider that jurors in high-profile cases do not have the same access to information that the ordinary layperson has, the "questionableness" of their decisions begins to disappear. The jury's role is to adjudicate the guilt or innocence of the defendant based on the evidence presented in court. Any criticism of jury verdicts that fails to take into account the difference between the information that the public has access to and that the jury actually heard should be viewed with extreme caution.

Legislators who propose constitutional amendments in response to anomalous cases have an increased responsibility to explain how these changes are likely to impact the majority of cases—those which do not receive Simpson-like publicity.

*b. the proposed constitutional amendments will have
a disproportionate impact on the poor*

When legislators and lobbyists propose constitutional change in response to high-profile trials, there is a tendency to frame the problem in terms of one or two high-profile cases while ignoring the rest of the system. For example, the first Menendez trials involved two brothers who were able to expend millions of dollars to prepare their defense. When the juries hung in both trials, critics of the jury system pointed to the Menendez trials and called for elimination of the unanimity requirement, arguing that it was unrealistic for the prosecutor to get all twelve jurors to agree.³³⁵

The consequence of such a change would be that prosecutors may have an easier time convicting defendants like the Menendez brothers who have millions of dollars at their disposal. However, nobody considers what will happen to the majority of defendants, those who cannot afford the type of defense that the Menendez brothers presented.³³⁶ Attorneys assigned to represent indigent defendants

334. Gerald F. Uelman, *Did the jury system fail in the Simpson trial?*, SACRAMENTO BEE, Oct. 14, 1995, at B7. The Simpson case is quite illustrative of this point. For example, the jury did not get to hear the entire tape-recorded interview of Mark Fuhrman or the tearful accusations of Ronald Goldman's father. *Id.* Both of these excerpts were partly responsible for shaping public opinion about the defendant's guilt or innocence. *Id.*

335. Tanzer, *supra* note 50, at B9.

336. For a general discussion of the problems associated with counsel for indigent defendants, see Meyer, *Vanguard*, *supra* note 207, at A12.

have few resources to wage a defense.³³⁷ A constitutional change making the prosecutor's job easier will make the defense attorney's job more difficult.

Elimination of the unanimity requirement will have a disproportionate impact on the poor even if it happens to prevent an occasional Menendez-type situation in the future.³³⁸ Since the majority of cases are unlike high-profile cases, a constitutional change is not an appropriate measure to take.³³⁹

8. Other ways to improve the jury system exist

Amending the California Constitution is a serious undertaking. The amendment process is extremely difficult to satisfy and the resulting change, unlike a legislative enactment, carries with it a certain sense of finality. Arguably such a change should be reserved for only the most compelling situations when every other avenue of improvement has been exhausted.³⁴⁰ In the case of jury unanimity, there remain other means by which we can improve the jury system.

One of the arguments against the unanimity requirement is that often individual jurors arrive at "questionable decisions" because they do not understand the judge's instructions.³⁴¹ Perhaps a better solution than constitutional change is to rewrite the instructions that judges give to juries so they are more comprehensible to the layperson.³⁴² If juries hang because of juror ignorance, we should focus on eliminating the ignorance as opposed to eliminating a defendant's constitutional safeguard.

In addition to making legal instructions more accessible, allowing jurors to ask questions and take notes during all criminal proceedings may lead to more informed decisionmaking.³⁴³ Surely these are measures that may substantially improve the jury system without

337. Weinstein & Rutten, *supra* note 188, at A34. In Alabama, for example, attorneys appointed to represent indigents in capital cases receive just \$1000 to prepare the entire case while the DNA experts alone in the Simpson case cost up to \$50,000 a week. *Id.* Bryan Stevenson, director of the Capital Representation Center in Alabama, claims that several capital cases involve "one paragraph closing arguments" by defense counsel. *Id.*

338. *Id.*

339. See Chemerinsky, *Wrong Inspiration*, *supra* note 329, at B9; Taylor-Thompson, *supra* note 297, at A19; Wilson, *supra* note 305, at A2.

340. Chemerinsky, *Nixing*, *supra* note 36, at 3.

341. See *supra* notes 212-14 and accompanying text.

342. Hirsch, *supra* note 188, at A23; Strier, *supra* note 203, at B7.

343. Hirsch, *supra* note 188, at A23; Strier, *supra* note 203, at B7.

having to resort to the extreme measure of changing the California Constitution.

V. EVALUATING THE ARGUMENTS: IT IS BETTER TO
ERR ON THE SIDE OF THE DEFENDANT

The U.S. Constitution guarantees a criminal defendant a trial by an impartial jury. While the Supreme Court has ruled that a jury verdict in a federal trial must be unanimous, the states may determine for themselves whether to read a unanimous verdict requirement into their own constitutions. For over 145 years California has chosen to require a unanimous jury decision to convict a defendant. This decision reflects California's historical commitment to protecting the defendant from tyranny by the state.

The current proposals for constitutional change are based on the notion that the current jury system is not working properly and that in order to fix the problem, California must eliminate the unanimity requirement. Nonunanimous verdicts will decrease California's hung jury rate, convict more defendants at the first trial, and restore the public's confidence in the system.

Despite the temptation to embrace this rationale, the evidence posited by proponents of the amendment simply does not support the contention that elimination of the unanimity requirement will really solve the problems of the criminal justice system. Although California does have a hung jury rate of approximately ten percent, this figure represents only a small number of cases handled by the system, and it is unclear whether allowing for 10-2 or 11-1 verdicts will really increase the number of convictions or acquittals.

When asked to substantiate their claims that the unanimity requirement is to blame for the system's problems, critics point to the Menendez trial, the O.J. Simpson trial, and the Rodney King trial. These cases are simply not representative of the criminal justice system and "it would be utter folly to initiate any fundamental reform of the system based on a single case, or any small group of notorious cases . . . which are representative of almost nothing except excess and bad taste."³⁴⁴

Even if we concede that elimination of the unanimity requirement will decrease hung jury rates and save some economic and judicial costs, the risks involved in decreasing the systemic protections

344. *Anomaly*, *supra* note 192, at B6.

of the defendant outweigh the benefits. Nonunanimous verdicts ease the prosecution's burden and upset jury deliberation, a hallmark of the jury system in this country for hundreds of years. If only ten or eleven jurors are required to secure a verdict, it is not likely that once that number is reached the members of the majority will bother to hear the arguments of the dissenters.

It is true that the jury system is imperfect and there are clearly areas which must be addressed in the near future. The fundamental disagreement concerns how to implement change and improvement. A constitutional amendment is simply not the appropriate means of attacking the jury system problems, especially when the evidence supporting the change is thin and the proponents of the change are using an anomalous high-profile trial to fuel the movement.

How fitting it was that the O.J. Simpson trial ended in a unanimous acquittal. So many critics of the jury system predicted a hung jury, but the Simpson jury sent the message that "juries can reach unanimous decisions, even in cases that involve hot-button social issues, whether it's spousal abuse, police misconduct, or race-based discrimination." ³⁴⁵

VI. CONCLUSION

Despite the constitutionality of the proposed amendments to the California Constitution, the arguments for their adoption do not overcome the potential injustices that they may encourage. The jury system has long been regarded as one of the defining features of our system of democracy. When the state acts in a manner which neuters the jury system, the entire criminal justice system is put in jeopardy.

The unanimity requirement serves an important function in jury trials. Requiring all twelve members of the jury to reach a consensus encourages deliberation and assures consideration of both majority and minority viewpoints prior to rendering a decision. By eliminating the unanimity requirement, the jury is less likely to adequately deliberate issues and the majority may overpower the minority voice.

In a system that presumes the defendant innocent until proven guilty, any error must fall on the side of protecting the accused. The state has the burden of proving beyond a reasonable doubt that the

345. *Necessity of Change*, *supra* note 8, at S4 (quoting Elizabeth Semel, San Diego criminal defense attorney).

defendant is guilty and any law which eases this burden threatens the integrity of the system.

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